80-613

No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SHOSHONE and ARAPAHOE TRIBES,
Petitioners

v.

DRY CREEK LODGE, INC., *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an Indian tribe has no immunity from suit when sued by a non-Indian.

2. Whether this Court's decision in *Santa Clara Pueblo* v. *Martinez*, holding that the Indian Civil Rights Act does not waive tribal sovereign immunity, conflicts with the court of appeals' decision that an Indian tribe is not immune from a suit in federal court brought by a non-Indian corporation and non-Indian individuals for money damages under the Indian Civil Rights Act.

3. Whether this is an appropriate case for summary reversal.

LIST OF PARTIES

The petitioners are the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation, Wyoming.

The respondents are Dry Creek Lodge, Inc., a Wyoming corporation; Albert C. Cook; Elizabeth P. Cook; Thomas Burlingham; Benjamin Miller; Bernice Miller; Robert Miller and David Miller.*

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* Respondents' complaint, as amended, initially named as defendants the United States, the Secretary of the Interior, the Area Director of the Billings Area Office, Bureau of Indian Affairs, the Superintendent of the Wind River Agency, the BIA Special Officer, Wind River Agency, the Shoshone and Arapahoe Tribes, the Joint Business Council of the Shoshone and Arapahoe Tribes and the individual members thereof, and individual Indians who own an interest in certain trust allotments on the Wind River Reservation. All defendants except the Shoshone and Arapahoe Tribes have been dismissed at various stages of the case and are not parties to the proceedings in this Court.

The respondents Albert C. Cook, Elizabeth P. Cook and Thomas Burlingham are not Indian; the respondents Benjamin, Bernice, Robert and David Miller are.

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v.

DRY CREEK LODGE, INC., *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Shoshone and Arapahoe Tribes of the Wind River Indian Reservation, Wyoming, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (App. A, *infra*) are reported at 623 F.2d 682.

The findings of fact and conclusions of law of the district court (Judge Kerr) on the initial hearing dismissing the suit against the Tribes and federal officers are reproduced as Appendix B, *infra*.

The 1975 decision of the court of appeals reversing the dismissal of the case against the Tribes and federal officers (App. D, *infra*) is reported at 515 F.2d 926.

On July 18, 1977, after a jury trial, the district court (Judge Anderson) entered judgment dismissing a number of claims but awarding plaintiffs $525,000 in damages against the Shoshone and Arapahoe Tribes. (App. E, *infra.*)

On February 18, 1978, Judge Anderson entered an order (App. F, *infra*) granting a new trial to the Tribes on liability and damages. On October 12, 1978, after this Court's decision in *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, *supra*, Judge Anderson dismissed the action against the Tribes. The court's reasons for dismissal are given in the order of dismissal (App. G, *infra*) and in the transcript of the hearing of September 11, 1978 (App. H, *infra*).

JURISDICTION

The judgment of the court of appeals (App. A, *infra*) was entered on June 20, 1980. A timely petition for rehearing with suggestion for rehearing *en banc* was denied by the court of appeals on July 18, 1980. (Apps. I and J, *infra.*) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1301-1303, provides in pertinent parts:

> "1302(8).
>
> No Indian tribe in exercising powers of self-government shall
>
> * * *
>
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
>
> * * *

"1303.

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

25 U.S.C. 1301-1303 are reproduced in their entirety as Appendix K to this petition.

STATEMENT OF THE CASE

Background

Albert and Elizabeth Cook, both non-Indians, owned 160 acres of land within the Wind River Indian Reservation. The shortest means of access to their land from the nearest highway was by a three-and-one-half mile private dirt road crossing several pieces of land held in trust by the United States for individual Shoshone Indians as allottees. (App. B, *infra*, Findings Nos. 7, 8.)

Until 1974 the Cooks used their land solely for stock raising and residential purposes, and the allottees allowed them to use the road without objection although no right-of-way had been obtained. (App. D, *infra*, p. 23a; 515 F.2d at 929; App. B, *infra*, Findings Nos. 3, 6.)

Early in 1974 the Cooks formed Dry Creek Lodge, Inc., a Wyoming corporation, and began to construct a bar, restaurant and lodge on their land. When the allottees, the Bonatsie family, learned of the Cooks' planned commercial enterprise, they informed the Cooks that they objected to use of the private road for commercial purposes because of the increased vehicular traffic across their land. (Tr. Inj. 51, 84-85.)[1] At no time before or

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[1] "Tr. Inj." refers to the one-volume transcript of the hearing on plaintiffs' motion for a preliminary injunction dated June 7, 1974.

during the construction of the commercial facilities or after litigation commenced did the Cooks obtain a right-of-way over the Bonatsies' land as is required by federal law, 25 U.S.C. 323-325, and regulations, 25 C.F.R. Part 161. (See App. D, *infra*, pp. 22a-23a; 515 F.2d at 928-929; App. B, *infra*, Finding 13.)

When the Cooks continued to use the road and finally announced the grand opening of the lodge despite their failure to obtain a right-of-way, the Bonatsies protested to the governing bodies of the Shoshone and Arapahoe Tribes (the "Business Councils"). (App. D, *infra*, p. 23a; 515 F.2d at 929; Tr. Inj. 157-159.)

Responding to the Bonatsies' plea for assistance, the Business Councils adopted Resolution 3415, requesting the Wind River Agency of the Bureau of Indian Affairs to prevent further trespasses across individual trust land. (App. B, *infra*, Finding No. 11.) The Bonatsies then closed the road across their allotments. At the direction of the Superintendent of the Wind River Agency, the Bureau of Indian Affairs police assisted in keeping the road closed and in preserving the peace. (App. B, *infra*, Finding No. 12.)

The Proceedings in this Case

The Cooks, Dry Creek Lodge, Inc. and others brought suit in the United States District Court for the District of Wyoming to declare that they owned a right-of-way across the Bonatsies' land; to enjoin the United States, individual federal officials, the Tribes, the Business Councils and members thereof from interfering with their alleged right-of-way; and to obtain money damages for alleged conspiracies and due process and equal protection violations. Jurisdiction was invoked under 28 U.S.C. 1331, 1343 and 1353; 42 U.S.C. 1983 and 1985; and 25 U.S.C. 357 and 1302(8).

The district court (Judge Kerr) initially granted a temporary restraining order allowing plaintiffs to use the road for noncommercial purposes. After a hearing on the preliminary injunction, Judge Kerr issued findings of fact and conclusions of law (App. B, *infra*, July 11, 1974), and dismissed the case for lack of jurisdiction (App. C, *infra*, July 29, 1974). Judge Kerr found that the plaintiffs had not shown that they owned a right-of-way across the Bonatsies' land, that the United States and the Tribes possess sovereign immunity from suit, and that the individual defendants had not violated plaintiffs' civil rights or acted outside of their statutory authority. (App. B, *infra*, Conclusions 4, 6, 7, 17, 18, 19, 21, 24.) He also noted that plaintiffs had not pursued the available administrative procedures for obtaining a right-of-way over trust land through the Bureau of Indian Affairs. (App. B, *infra*, Conclusions 9 and 10.)

On appeal, the United States Court of Appeals for the Tenth Circuit reversed the district court's dismissal of the case against, among others, the federal officials and the Tribes.[2] The court of appeals noted, in an opinion written before this Court's decision in *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. 49, that other federal courts had held that the Indian Civil Rights Act implied a waiver of tribal sovereign immunity. It held that the district court had jurisdiction under 28 U.S.C. 1343 to hear claims against the Tribes based on the Indian Civil Rights Act. (App. D, *infra*, pp. 31a-35a; 515 F.2d at 932-934.)

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[2] The court of appeals affirmed the dismissal of the United States on the ground of sovereign immunity. The court found jurisdiction over the federal officials under 42 U.S.C. 1985 and under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). (App. D, *infra*, pp. 25a-30a; 515 F.2d at 930-932.)

On remand, after presentation of the plaintiffs' evidence, Judge Anderson [3] ruled that the road in question was not a public road.[4] (App. E, *infra*, p. 41a.) The judge then permitted the jury to consider claims for $1,500,000 in money damages against the Tribes for denial of equal protection and deprivation of liberty without due process in violation of 25 U.S.C. 1302(8), and against two individual federal defendants for deprivation of liberty without due process, but the judge instructed the jury not to award plaintiffs any commercial damages. The jury found in favor of the federal officials but awarded money judgments totalling $525,000 against the Tribes.[5] (Order of July 18, 1977, App. E, *infra*.)

On the Tribes' motion, the district court set aside the verdict against the Tribes and granted a new trial "with respect to liability and damages" (Order of February 18, 1978, App. F, *infra*) on the ground that the jury had disregarded the court's instructions related to damages.[6]

Soon thereafter, this Court decided *Santa Clara Pueblo* v. *Martinez*, *supra*, holding, *inter alia*, that the ICRA did not waive the Tribe's pre-existing sovereign immunity and therefore "suits against the Tribe under the ICRA

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[3] At the request of the plaintiffs, Judge Kerr recused himself, and the court designated Judge Anderson of Utah to hear the case.

[4] The Tribes do not dispute the respondents' or their successors' right of personal ingress and egress.

[5] Although the jury was instructed to determine liability and damages on the same basis for all plaintiffs and commercial damages were not to be considered, the verdict and judgment for $525,000 was divided to give $250,000 to each of the Cooks, the two non-Indian lodge owners, but only $5,000 each to the four Indian lodge employees and Mr. Burlingham.

[6] Before these issues went to the jury Judge Anderson had dismissed all other remaining defendants in the case, all conspiracy-based claims for damages, and seven Indian plaintiffs. (App. E, *infra*, p. 41a.)

are barred by its sovereign immunity from suit." 436 U.S. at 59. Thereupon the Tribes again moved to dismiss the case and the district court granted the motion on the ground that *Santa Clara* "squarely applies to this action." (Order of October 12, 1978, App. G, *infra.*)

The plaintiffs appealed the district court's dismissal of the case.[7] The court of appeals in a 2-1 decision again reversed and remanded for a new trial on the issues of damages.

In its brief opinion, which contains significant factual inaccuracies,[8] the court of appeals concluded that the ICRA tacitly waived tribal immunity from suit where the plaintiff is a non-Indian. The court attempted to distinguish *Santa Clara* as concerned only with "internal matters concerning tribal members," ignoring this Court's

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[7] The district court awarded costs to the Tribes, and the plaintiffs also appealed that ruling to the court of appeals.

[8] For example:

a) the court of appeals incorrectly states that the Tribal Business Councils are the "judicial bodies of the Tribes." (App. A, *infra*, p. 3a; 623 F.2d at 684.) To the contrary, the judicial body for the Tribes is a Court of Indian Offenses, an agency of the federal government established pursuant to 25 C.F.R. Part 11;

b) the court failed to acknowledge that the district court had granted a new trial "both as to liability and damages," thus leaving no factual conclusions that the Tribes had violated plaintiffs' rights. As a result the court "remanded for a new trial on the issue of damages," leaving for the district court to determine how to award damages when no finding of wrongdoing has been made;

c) though basing its decision on the fact that the plaintiffs are non-Indian, the court failed to note that four of the plaintiffs are Indians;

d) contrary to the court's statements regarding the Tribes' involvement in closing the road (App. A, *infra*, pp. 3a-4a; 623 F.2d at 684), the only tribal action ever shown was a formal resolution to request the Bureau of Indian Affairs and Bureau of Indian Affairs police to prevent illegal trespass across allotted land and to maintain the peace.

express holding that the ICRA did not waive tribal immunity from suit, and ignoring this Court's decisions in *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940) and *Puyallup Tribe* v. *Washington Department of Game*, 433 U.S. 165 (1977), which affirm tribal immunity against suits brought by non-Indians.

Judge Holloway, in his dissent, stated (App. A, *infra*, pp. 7a-8a; 623 F.2d at 685-686) that "the *Santa Clara* opinion compels dismissal as to the sole remaining defendants, the tribes," relying upon the broad terms in which the Supreme Court held that Section 1302 of the ICRA "does not impliedly authorize actions for declaratory or injunctive relief against the tribe or its officers." He concluded (App. A, *infra*, p. 8a; 623 F.2d at 686) "I must agree that these damage claims are likewise barred by the immunity doctrine, unless and until Congress provides otherwise."

The Tribes petitioned for rehearing with suggestion for rehearing *en banc*, pointing out that the court of appeals' decision is directly contrary to this Court's holding in *Santa Clara* that the ICRA does not waive tribal immunity from suit, and that the decision ignores the prior decisions of this Court recognizing tribal immunity and is contrary to the recent *en banc* decision of the court of appeals, which, in the context of a suit by non-Indians under the ICRA, held that a tribe possesses immunity from suit unless that immunity is specifically waived. *Merrion* v. *Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), No. 80-11, certiorari granted October 6, 1980.[9] The court of appeals denied the Tribes' petition. (Apps. I and J, *infra*.)

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[9] The two judges who wrote the majority opinion in the instant case were the only dissenting judges in *Jicarilla*. The court in *Jicarilla*, which upheld a tribal mineral tax, found that the Tribe's immunity had been expressly waived by the Tribe in its tax ordinance and by the Secretary of the Interior in approving the ordinance.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals Directly Conflicts with this Court's Consistent Decisions Upholding Tribal Immunity from Suit Including this Court's Recent Decision on the Indian Civil Rights Act, *Santa Clara Pueblo* v. *Martinez.*

This Court has clearly and consistently recognized Indian tribes' immunity from suit. As the Court stated in *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58-59 (1978), summarizing its prior decisions:

> "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Turner* v. *United States*, 248 U.S. 354, 358 (1919); *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513 (1940); *Puyallup Tribe* v. *Washington Dept. of Game*, 433 U.S. 165, 172-173 (1977). This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But 'without congressional authorization,' the 'Indian Nations are exempt from suit.' *United States* v. *United States Fidelity & Guaranty Co.*, *supra*, at 512.
>
> "It is settled that a waiver of sovereign immunity "'cannot be implied but must be unequivocally expressed.'" *United States* v. *Testan*, 424 U.S. 392, 399 (1976), quoting, *United States* v. *King*, 395 U.S. 1, 4 (1969)."[10]

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[10] As noted in note 2, *supra*, in the first appeal in the present case the court of appeals dismissed the plaintiffs' claims against the United States on the ground of sovereign immunity. (App. D, *infra*, pp. 25a-26a; 515 F.2d at 930.)

Tribal immunity has never depended on the identity of the plaintiff. In *United States Fidelity & Guaranty Co.*, *supra*, and *Puyallup Tribe*, *supra*, the plaintiffs were non-Indian. Moreover, the detriment to a tribe is equal whether a judgment is recovered against the tribal treasury by an Indian or a non-Indian.

For a time there was a question as to whether the Indian Civil Rights Act waived tribal immunity from suit. This Court, however, settled the matter in *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. 49, reversing this same court of appeals and holding specifically that (*id.* at 59): "* * * *suits against the tribe under the ICRA are barred by its sovereign immunity from suit.*" (Emphasis added.) There is no vagueness in that holding.[11]

The decision of the court of appeals below is thus directly contrary to the decision of this Court in *Santa Clara*. Its reasoning seems to be based on a double fallacy. First, the court suggests that even where there is sovereign immunity there must be some court that can render judgment against the sovereign itself. (*See* App. A, *infra*, p. 6a; 623 F.2d at 685.) But the purpose of sovereign immunity is to protect the sovereign

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[11] The Court noted (*ibid.*) that "[n]othing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief" and that habeas corpus is the only federal review provided by the ICRA. The plaintiffs in *Santa Clara* sought injunctive and declaratory relief. There is equally nothing in the ICRA purporting to subject the Tribes to money damages—a more central area of tribal immunity than injunctive or declaratory relief. In both *Turner* v. *United States*, 248 U.S. 354 (1919) and *United States* v. *United States Fidelity & Guaranty Co.*, *supra*, 309 U.S. 506 (1940), this Court held that tribal sovereign immunity barred suits for damages. Sovereign immunity, which bars suits, not just judgments, against the sovereign does not depend upon the type of redress that a plaintiff seeks.

against suits in any court, particularly for money judgments, unless that immunity has been specifically and unequivocally waived. Second, the court of appeals seems to assume that tribal immunity was *created* by the Indian Civil Rights Act. (*See* App. A, *infra*, p. 6a; 623 F.2d at 685.) But tribal immunity long predated that Act and simply was not waived by the Act. There is nothing new in tribal governments being immune from suit. The writ of certiorari should thus be issued, and the judgment of the court of appeals reversed to correct its disregard of this Court's decisions.[12]

II. The Court of Appeals' Decision Conflicts with the Decisions of Other Courts of Appeals and with Its Own Prior Ruling.

Since this Court's decision in *Santa Clara*, the Courts of Appeals for the Fourth, Eighth and Ninth Circuits have all held that suits brought against Indian tribes under the Indian Civil Rights Act are barred by tribal sovereign immunity. *Crowe* v. *Eastern Band of Cherokee Indians, Inc.*, 584 F.2d 45 (4th Cir. 1978); *Mousseaux* v. *Rosebud Sioux Tribe*, 582 F.2d 1287 (8th Cir. 1978); *Stands Over Bull* v. *Crow Tribe*, 578 F.2d 799 (9th Cir. 1978) (withdrew previous opinion *sua sponte* in light of *Santa Clara*). To be sure, these cases all involve suits by Indians, but in light of this Court's holding in *Santa Clara* that the ICRA did not waive tribal

[12] The court of appeals' opinion appears to be based on sympathy for the plaintiffs, rather than law, but that sympathy is misplaced. If the plaintiffs had followed the statutory and regulatory procedures for obtaining a right-of-way, and not determined to ride roughshod over the wishes of the Indian allottees, there would have been no lawsuit. Moreover, the plaintiffs had their full day in court against the federal officers who permitted the road to be blocked and guarded the blockade, and against the individual Indians who blocked the road, but the plaintiffs lost on the merits. They are not entitled to proceed against the Tribes themselves in disregard of the Tribes' immunity from suit.

immunity, and the irrelevancy of the race of the plaintiff to sovereign immunity, they may fairly be said to conflict with the decision of the court of appeals here.[13]

The United States District Courts for the District of Arizona and the Southern District of Florida have each expressly held that suits by non-Indians against Indian tribes under the ICRA are barred by tribal sovereign immunity, relying upon this Court's decision in *Santa Clara. Salt River Agricultural Improvement & Power Dist.* v. *Navajo Tribe*, 5 Ind. L. Rep. F-116 (D. Ariz. 1978); *Shubert Construction Co. Inc.* v. *The Seminole Housing Authority*, 7 Ind. L. Rep. 3121 (S.D. Fla. 1980).[14]

The court of appeals' decision, as we have noted, even contradicts its own prior decision in *Merrion* v. *Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), where the court considered the issue of federal jurisdiction in a suit under the ICRA brought by non-Indians against an Indian tribe for declaratory and injunctive relief to prevent enforcement of a tribal oil and gas severance tax. The court recognized the validity of the doctrine of tribal sovereign immunity whether the plaintiff is Indian or non-Indian and noted, citing *Santa Clara* and *United*

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[13] Numerous federal district courts have also dismissed suits brought by Indians. *Wells* v. *Philbrick*, 486 F. Supp. 807 (D. S.D. 1980); *Rodriguez* v. *La Jolla Band of Mission Indians*, 7 Ind. L. Rep. 3088 (S.D. Cal. 1980); *Thompson* v. *State of New York*, 487 F. Supp. 212 (N.D. N.Y. 1979); *Wilson* v. *Turtle Mountain Band of Chippewa Indians*, 459 F. Supp. 366 (D. N.D. 1978). *Thompson*, *Wells* and *Wilson* involved claims for damages.

[14] The United States District Court for the District of Utah also held that a suit brought by a non-Indian against a tribe under the ICRA and other federal statutes was barred by tribal sovereign immunity. The United States Court of Appeals for the Tenth Circuit affirmed the lower court dismissal on other grounds. *Wardle* v. *Ute Indian Tribe*, 5 Ind. L. Rep. L-20 (D. Utah 1978), *aff'd*, 623 F.2d 670 (10th Cir. 1980). Copies of these opinions are being lodged with the Clerk.

States Fidelity & Guaranty Co., that "these cases clearly hold a tribe cannot be sued absent consent." [15]

III. The Decision of the Court of Appeals Has Important and Far-Reaching Consequences for Indian Tribes and Federal Indian Law.

The court of appeals' decision in this case profoundly alters the boundaries of the doctrine of tribal sovereign immunity. First, contrary to all judicial precedent, *e.g.*, *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 58-59, 61; *United States* v. *United States Fidelity & Guaranty Co.*, *supra*, 309 U.S. at 512, the court in effect found that Congress had *impliedly* waived tribal sovereign immunity in a statute that expressly and deliberately provided for only one remedy, habeas corpus. Consequently, the court of appeals' decision, if allowed to stand, would allow federal courts to interfere with the plenary authority of Congress to determine the scope of tribal sovereign immunity, a result which is contrary to the limited role that this Court has consistently established for the federal judiciary in this area. *Santa Clara*, *supra*, 436 U.S. at 60.

Perhaps even more significantly, the court of appeals' decision alters the substance of the doctrine of tribal sovereign immunity by providing that its applicability in a suit under the Indian Civil Rights Act depends upon the race of the plaintiff. This consideration is properly irrelevant to sovereign immunity. One of the primary purposes of the doctrine of sovereign immunity is to protect the treasury of a government. *See Edelman* v. *Jordan*, 415 U.S. 651, 673-74 (1974); *Thebo* v. *Choctaw Tribe*, 66 F. 372, 376 (8th Cir. 1895). Hence sovereign immunity protects the United States against claims for damages unless Congress expressly consents to such suits no matter who the plaintiff is or where

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[15] As noted at note 9, *supra*, the court found such consent had been given.

the suit is brought. *See, e.g.*, Federal Tort Claims Act, 60 Stat. 842, 28 U.S.C. 2671-2680.

Until the court of appeals' decision in the present case, no federal appellate court ever had authorized an award of monetary damages against an Indian tribe in any forum, whether suit was brought by an Indian or non-Indian. (*See Thebo* v. *Choctaw Tribe*, *supra*, 66 F. 372, and *United States* v. *United States Fidelity & Guaranty Co.*, *supra*, 309 U.S. 506. And, as this Court noted in *Santa Clara*, *supra*, 436 U.S. at 64, Congress in enacting the Indian Civil Rights Act did not want to "impose serious financial burdens on already 'financially disadvantaged' tribes by subjecting them to suit in federal court."

The importance of sovereign immunity is far greater to Indian tribes than to the federal government, though the principles governing it are the same as to either government. Indian tribes lack the broad tax base and deep treasuries that the United States has. Tribal people, among the poorest groups in the Nation, depend on services and revenues from tribal governments for their livelihood. Defense of numerous suits and payment of large judgments to individuals can deplete tribal treasuries. Moreover, tribal governments exist among non-Indian populations often hostile to them, which increases the risk of suit and the risk of decisions by unfriendly juries. Many of the elements that called for special protection of Indian tribes exist today just as they did when this Court spoke in *United States* v. *Kagama*, 118 U.S. 375, 384 (1886).

Until now, tribes have been protected by their immunity from suit which has been recognized by the courts and Congress. This decision poses a major threat to Indian tribes in the Tenth Circuit, where many of the major tribes are located, and throughout the country. Unless reversed, the decision will stimulate suits for damages against the tribes.

IV. This Is An Appropriate Case for Summary Reversal.

This Court has fully considered and ruled on and upheld tribal immunity from suit in *United States* v. *United States Fidelity & Guaranty Co., supra, Puyallup Tribe* v. *Washington Dept. of Game, supra,* and has specifically held in *Santa Clara* that the Indian Civil Rights Act does not waive this immunity. The decision of the court of appeals is contrary to those decisions, its own prior *en banc* decision and the consistent decisions in other circuits. There is no reason for the Court to use its time or the parties' time and money to decide the same issues again. It is therefore respectfully suggested that the decision of the court of appeals should be summarily reversed.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the court of appeals should be summarily reversed on the basis of *Santa Clara Pueblo* v. *Martinez, Puyallup Tribe* v. *Washington Department of Game* and *United States* v. *United States Fidelity & Guaranty.*

Respectfully submitted,

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October 1980

Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1999

[June 20, 1980]

DRY CREEK LODGE, INC., a Wyoming corporation, *et al.*,
Plaintiffs-Appellants,

v.

ARAPAHOE and SHOSHONE TRIBES,
Defendants-Appellees.

On Appeal From The
United States District Court
For The District of Wyoming

(D.C. No. C 74-74A)

John R. Hursh of Central Wyoming Law Associates, P.C., Riverton, Wyoming (G. L. Spence of Spence, Moriarity & Schuster, Jackson, Wyoming, with him on the brief), for Appellants.

Harry R. Sachse of Sonosky, Chambers & Sachse, Washington, D.C. (Marvin J. Sonosky of Sonosky, Chambers & Sachse, Washington, D.C., with him on the brief for

Appellee Shoshone Tribe; R. Anthony Rogers of Wilkinson, Cragun & Barker, Washington, D.C., on the brief for Appellee Arapahoe Tribe), for Appellees.

Before SETH, Chief Judge, HOLLOWAY and BARRETT, Circuit Judges.

SETH, Chief Judge.

The case originally came to this court upon a dismissal of plaintiffs' complaint for damages for lack of jurisdiction. We reversed and remanded the case for trial. Dry Creek Lodge, Inc. v. United States, 515 F.2d 926 (10th Cir.). The previous opinion contains the holdings as to parties and disposition of several issues.

Upon remand the case was tried on the merits. The jury returned a verdict for plaintiffs against the defendant Tribes only, judgment was entered, and costs were assessed against the Tribes. On motion by defendant Tribes the trial court granted a new trial on the ground that the jury did not properly handle the issue of damages.

Before the case was retried the Supreme Court handed down Santa Clara Pueblo v. Martinez, 436 U.S. 49. The trial court thereupon dismissed the action on the theory that *Santa Clara* had decided the issue of jurisdiction. The plaintiffs have taken this appeal.

The facts are, of course, the same as on the original appeal, and the case is again before us following a dismissal for lack of jurisdiction.

The facts are set out in our previous opinion but some restatement appears to be useful. Plaintiffs' land is within the exterior boundaries of the Wind River Reservation of the Shoshone and Arapahoe Indians in Wyoming. The reservation is large and the town of Riverton and other

settlements are within its boundaries. Many more non-Indians than Indians live within the boundaries. There are a large number of patented tracts owned in fee by non-Indians not including the property in Riverton. The reservation boundaries have changed substantially from time to time.

The lands of plaintiff corporation were patented to a predecessor in title in 1924. There was a small road providing access from the land of Dry Creek Lodge to the principal highway. This had been used by plaintiffs and other persons for access to the fee land and other lands for a period of some eighty years.

Plaintiffs Cook, who are non-Indians, had owned the 160-acre tract for about ten years and had lived there. They decided to build a guest lodge for hunting, and consulted the superintendent of the reservation about the matter. He advised them that projects of that type were encouraged to provide employment. He also stated that there would be no access problem. A license to plaintiffs Cook was issued for the business. The individuals then formed Dry Creek Lodge, Inc. to build the facilities. This was done with a SBA loan. The lodge was completed and opened, but the next day the Tribes closed the road at the request of a nearby Indian family, the Bonatsies. The access road had crossed an allotment belonging to this family. Apparently the plaintiffs have lost the property by foreclosure. The access road was closed in 1974.

The Tribes have a Joint Business Council which is composed of the Business Councils of each Tribe. These Councils are the legislative, executive and judicial bodies for the Tribes. The Tribal Business Councils are elected by members of each Tribe. The record contains the minutes of several meetings of the Joint Council relative to closing the business and the access road. The Council directed that access to the Dry Creek Lodge be prevented

by the federal officers, and the Bonatsies were apparently to erect the barricade. With the road blocked the persons on the Dry Creek land could not get out and were for all practical purposes confined there until a federal court issued a temporary restraining order. Thereafter the plaintiffs sought a remedy with the tribal court, but were refused access to it. The judge indicated he could not incur the displeasure of the Council and that consent of the Council would be needed. 25 C.F.R. § 11.22. The consent was not given. The state court cases were apparently removed to the federal court. In the federal court the defendants urged that there was no remedy—no jurisdiction. The defendants again assert there is no remedy in the federal court by reason of the *Santa Clara* case. The Tribal Business Council, according to the minutes, directed that the differences between the Bonatsie family and the plaintiffs should be settled by self-help, and this was done. The plaintiffs, however, did not respond in the same way. The defendants argue here, as they did in the trial court, that the plaintiffs have no remedy. There is no forum where the dispute can be resolved and the personal and property rights asserted by plaintiffs be considered.

Before considering the *Santa Clara* opinion we would like to look at one aspect of Oliphant v. Suquamish Indian Tribe, 435 U.S. 191. This relates to the sovereignty holding by the Ninth Circuit. The circuit had in substance held that the authority there in issue was presumed to be in the Tribe unless Congress had acted. The majority in the circuit opinion posed the question as to whether Congress had taken away the sovereignty of the Tribe as to the matter in issue. The Supreme Court reversed and turned the matter around. The Court said:

> "But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court

> of Appeals recognized, Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers '*inconsistent with their status.*' " (Emphasis supplied.)

The Court in *Oliphant* also said:

> "Protection of territory within its external political boundaries is, of course, as central to the sovereign interests of the United States as it is to any other sovereign nation. But from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty."

Santa Clara Pueblo v. Martinez, 436 U.S. 49, was an action by a member of the Tribe challenging the Tribe and its officials as to the criteria used to determine property ownership and tribal membership. It was entirely an internal matter concerning tribal members and a matter of very great importance to the individuals. Injunctive and declaratory relief were sought. The members of the Tribe who were seeking relief also had access to their own elected officials and their tribal machinery to settle the problem. The Supreme Court held that the Indian Civil Rights Act could not be used by the plaintiffs under such circumstances to obtain an injunctive remedy against the Tribe. There was no "reservation" involved in *Santa Clara* as the lands had been granted to Santa Clara as a pueblo by the Governments of Spain or Mexico long before the American occupation. The issue and control was on the basis of ownership, tribal membership, and tribal use of its own lands. The problem was thus strictly an internal one between tribal members and the tribal government relating to the policy of the

Tribe as to its membership. Of course, there were no non-Indians concerned.

By the decision in *Santa Clara* the tribal members seeking injunctive relief under the Indian Civil Rights Act were in substance directed to the remedies available to them in their own tribal courts and from the officials they had elected. Much emphasis was placed in the opinion on the availability of tribal courts and, of course, on the intratribal nature of the problem sought to be resolved. With the reliance on the internal relief available the Court in *Santa Clara* places the limitations on the Indian Civil Rights Act as a source of a remedy. But in the absence of such other relief or remedy the reason for the limitations disappears.

The reason for the limitations and the references to tribal immunity also disappear when the issue relates to a matter outside of internal tribal affairs and when it concerns an issue with a non-Indian.

It is obvious that the plaintiffs in this appeal have no remedy within the tribal machinery nor with the tribal officials in whose election they cannot participate. The record demonstrates that plaintiffs sought a forum within the Tribes to consider the issue. They sought a state remedy and sought a remedy in the federal courts. The limitations and restrictions present in *Santa Clara* should not be applied. There has to be a forum where the dispute can be settled.

The plaintiffs alleged that their personal and property rights under the Constitution had been violated by the defendants. A jury so found and awarded damages. There must exist a remedy for parties in the position of plaintiffs to have the dispute resolved in an orderly manner. To hold that they have access to no court is to hold that they have constitutional rights but have no remedy. The self-help which was suggested to shut down

plaintiffs' "business," according to the Council minutes, and which was carried out with the help of the federal police, does not appear to be a suitable device to determine constitutional rights.

The Judgment and Order are reversed and the case is remanded for a new trial on the issue of damages.

HOLLOWAY, Circuit Judge, dissenting:

I respectfully dissent.

To me this is a most disturbing case because of the result I feel compelled to reach. The jury found a violation of the plaintiffs' civil rights recognized by § 1302 of the Indian Civil Rights Act, under most distressing circumstances. And yet it seems we must say that the doors are closed against any orderly redress for the wrongs. State and federal courts are barred by the immunity doctrine from hearing the claims and access was denied to the tribal court, as the majority opinion points out. Nevertheless, I must reluctantly agree with the trial court's conclusion that the *Santa Clara* opinion compels dismissal as to the sole remaining defendants, the tribes.

It is true, as the majority opinion emphasizes, that the *Santa Clara* case arose from a controversy of an intra-tribal nature where a remedy was sought by a person who could participate in the elective process and who had access to the tribal courts and other tribal machinery—a far cry from this case. The Supreme Court, however, laid down its holding in *Santa Clara* in broad terms of the tribes' traditional immunity from suit, of the absence in the Indian Civil Rights Act of provisions subjecting the tribes to federal court jurisdiction in civil actions for injunctive or declaratory relief, and of the exclusivity of the grant of federal habeas jurisdiction in § 1303, which was viewed as a deliberate failure to provide other remedies. The Court rejected the claim of jurisdiction, concluding that:

> . . . unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers. . . . (436 U.S. at 72).

I must agree that these damage claims are likewise barred by the immunity doctrine, unless and until Congress provides otherwise. *Wilson v. Turtle Mountain Bank of Chippewa Indians, et al*, 459 F. Supp. 366, 369 (D.N.D.). Thus I am constrained to dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C74-74

DRY CREEK LODGE, INC., *et al.*,
Plaintiffs,

vs.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter came on regularly for hearing before this Court, the plaintiffs being represented by their attorneys John R. Hursh of Riverton, Wyoming, and G. L. Spence of Casper, Wyoming; and the non-federal defendants being represented by their attorneys Marvin J. Sonosky of Washington, D.C., and William J. Thomson, Cheyenne, Wyoming, and the federal defendants being represented by Richard V. Thomas, United States Attorney for the District of Wyoming; and the Court having taken the evidence and testimony of witnesses and having heard the arguments of counsel, and having carefully reviewed the pleadings and amendments thereto, exhibits and briefs filed by the parties, and being fully advised in the premises, finds the facts specially and states separately its conclusions of law thereon, as follows:

Findings of Fact

1. That, this is an action by Dry Creek Lodge, Inc., a corporation organized under the laws of the State of Wyoming with its principal place of business in Fremont County, Wyoming; and by its principal owners and direc-

tors, Albert C. Cook and Elizabeth Cook, both non-Indians, to establish a means of ingress and egress to the Dry Creek Lodge Ranch.

2. That, Albert and Elizabeth Cook are the record owners in fee of 160 acres, which lands are located within the exterior boundaries of the Wind River Indian Reservation.

3. That, the 160 acres were purchased by Albert and Elizabeth Cook in 1965; and until 1973, the lands had been used solely for stockraising purposes, during which time ingress or egress had not been denied by any of the defendants.

4. That, Dry Creek Lodge, Inc., is engaged in, or desires to engage in, the business of conducting a resort lodge, with drinking and dining facilities; and to conduct hunting and outfitting expeditions.

5. That, the other party plaintiffs are Indian employees of Dry Creek Lodge, Inc., who allege they will lose their employment if construction of Dry Creek Lodge does not go forward.

6. That, prior to 1974, the lands owned by Dry Creek Lodge, Inc., had been used solely for stockraising purposes; and there had been no commercial enterprises on the land of the nature proposed by plaintiffs.

7. That, ingress to Dry Creek Lodge is by means of a primary dirt roadway, connecting to U.S. Highway 26, of approximately 3.5 miles in length, which roadway crosses some lands owned in fee and some lands which are held in trust by the United States for the benefit of the Shoshone Indian Tribe; and by another longer route or roadway which crosses trust lands of the Shoshone and Arapahoe Tribes.

8. That, of the lands held in trust, some are lands allotted to the individual Bonatsies, named as defendants

herein, who are Indians and members of the Shoshone Indian Tribe.

9. That, the other defendants are employees or officials of the United States, or are members of the Joint Business Council of the Arapahoe and Shoshone Tribes.

10. That, upon commencement of commercial operations by Dry Creek Lodge, Inc., a blockade was established on the primary access roadway by the Indian owners (Bonatsies) of the allotted trust lands over which the primary roadway coursed, in protest of this unprecedented use of the land which would result in a greatly increased volume of vehicular traffic.

11. That, the Business Councils of the Arapahoe and Shoshone Tribes requested, by resolution, the Superintendent of the Wind River Indian Reservation to protect the trust lands of the defendant Bonatsies and to ensure that no breach of the peace occurred.

12. That, the Superintendent of the Wind River Indian Reservation did thereupon dispatch Special Police Agents of the Bureau of Indian Affairs to supervise the blockade and to prevent any non-authorized traffic from crossing the allotted lands.

13. That, no valid easement or right-of-way across the allotted lands is shown as existing of record.

14. That, the Small Business Administration, which made a loan to the Dry Creek Lodge, Inc., expressed concern over the right of ingress and egress to the Superintendent of the Wind River Indian Reservation, who did advise the Small Business Administration that no valid right-of-way had been granted or made of record.

15. That, plaintiffs have not made the appropriate application for a right-of-way.

16. That, plaintiffs have not obtained the consent of the Indian owners, nor followed tribal regulations, for a right-of-way.

17. That, this Court entered a Temporary Restraining Order on May 21, 1974, which was continued by consent of the parties, with modifications, for fifteen (15) days from June 7, 1974, which resulted in removal of the blockade and allowed ingress and egress on a limited basis, but not for any commercial purpose.

18. That, plaintiffs pray to this Court that it enter a declaratory judgment declaring a "way of necessity across the lands described in the complaint"; or that this Court enjoin permanently the defendants from in any way interfering with plaintiffs' free use and access of the roadway crossing the allotted lands; and in the alternative, that the Court award damages to the individual plaintiffs.

19. That, plaintiffs appear to allege, not in short, plain, and concise statements, that jurisdiction for this action is conferred on this Court as to the various defendants, by virtue of 28 U.S.C., §§ 1331 ($10,000 and a federal question); 1343 (conferring jurisdiction for actions authorized by 42 U.S.C., § 1985); 1353 (suit involving right of an Indian to an allotment); 42 U.S.C., §§ 1983 (providing for suits for deprivation of civil rights under color of state law); 1985 (providing for suit for conspiracy by private persons acting under color of state law to deny another of equal protection of the laws); 25 U.S.C.A., §§ 357 (authorizing condemnation of Indian lands for a public purpose); 1302(8) (prohibiting denial to any person by an Indian tribe of its laws).

20. That, defendants have filed motions to dismiss and for summary judgment; that there exists no material issues as to any genuine issues of fact; and that such motions may be treated in a like manner.

Conclusions of Law

1. That, this Court is one of limited jurisdiction and no presumptions of federal jurisdiction exist. National Indian Youth Council v. Bruce, 485 F. 2d 97 (10th Cir. 1973); and that jurisdiction is determined by the facts, and not by conclusory allegations of jurisdiction.

2. That, the defendant, United States of America, holds the lands in dispute as trustee for the individual Indian defendants, the Bonatsies.

3. That, since some of the lands through which the claimed "way of necessity" passes are owned by the United States, the extent of any easement is governed by federal law unless there is a federal statute which makes state or local law applicable. Superior Oil Co. v. United States, 353 F. 2d 34 (9th Cir. 1965); United States v. Oklahoma Gas & Electric Co., 127 F. 2d 349 (10th Cir.), aff'd. 318 U.S. 206 (1943).

4. That, a way of necessity never exists where one has access to granted land through other land of his own, or over a way granted to him, however inconvenient the way may be. 2 Thompson on Real Property, § 363 (1962). Therefore, plaintiffs claim that a "way of necessity" be declared as to the road connecting with U.S. Highway 26 is deficient and flawed as long as the other access is available as shown, above, and so long as procedures are available for seeking the granting of such access, below.

5. That, all questions with respect to rights of occupancy in land, the manner, time and conditions of extinguishment of Indian title are solely for consideration of the federal government. Bennett County, South Dakota v. United States, 394 F. 2d 8 (8th Cir. 1968). Wyoming statutes on condemnation are inapt and inapplicable to the issue of a right-of-way over allotted lands held in

trust; where as here, the consent of the Secretary of the Interior for this suit has not been obtained.

6. That, as a party whose interest would be affected, and in whose absence any relief would be inadequate, the United States is an indispensable party; and, it cannot be sued without its consent, and any conditions or limitations must be strictly observed and exceptions thereto are not to be implied. Soriano v. United States, 352 U.S. 270 (1957); Minnesota v. United States, 305 U.S. 382 (1939); Hamilton v. Nakai, 453 F. 2d 152 (9th Cir. 1972). The United States has not consented to this suit; and as shown, below, the statutes claimed by plaintiff to confer jurisdiction do not.

7. That, the Arapahoe and Shoshone Tribes are cloaked with the doctrine of immunity, which is coextensive with that of the United States. United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940); which immunity may be modified by Congress through its plenary power. See 25 U.S.C., § 1302.

8. That, it is axiomatic that all administrative remedies normally must be exhausted before a Court will exercise its extraordinary equitable remedies.

9. That, where there are available administrative procedures for the determination of an application for a right-of-way by the Bureau of Indian Affairs, see 25 U.S.C.A., § 324, 25 C.F.R., § 161 et seq., the jurisdiction of this Court is relegated to a secondary position, in deference to the primary jurisdiction of the agency.

10. That, where the administrative remedies have not been exhausted and have not been shown that they would be futile if pursued to their culmination, the Court will show deference to the agency charged with the duty of carrying out statutory mandates, especially where construction of treaties might be involved. Kolovrat v. Oregon, 366 U.S. 187 (1961); Garvey v. Freeman, 397

F. 2d 600 (10th Cir. 1968); Board of Com'rs of Pawnee County, Okla. v. United States, 139 F. 2d 248 (10th Cir. 1943). Plaintiffs have not made any application pursuant to the Regulations, 25 C.F.R., § 161 et seq., and the remedy they seek is one that could be granted. cf. McCurdy v. Steele, 353 F. Supp. 629 (D. Utah 1973).

11. That, any decision affecting rights or privileges of an applicant may be appealed. 25 C.F.R., § 2.1 et seq.

12. That, such administrative procedures offer, in this case, a plain, adequate and complete remedy at law barring this Court from granting injunctive or other equitable relief.

13. An action for declaratory judgment does not give this Court jurisdiction, as it merely adds a remedy when the Court already has jurisdiction to entertain the suit. See Wells v. United States, 280 F. 2d 275 (9th Cir. 1960). Plaintiffs apparently, without so alleging, seek such relief under 28 U.S.C., § 2201; but where a special statutory proceeding has been provided, declaratory relief should be withheld pending resort to such remedies; especially where, as here, it could be determinative of the controversy.

14. That, for 28 U.S.C., § 1331, to confer jurisdiction on this Court, more than a mere allegation that the action arises under the Constitution, laws or treaties of the United States is required. It must be shown that a right or immunity created by the Constitution or laws of the United States will be enhanced or diminished, depending on the construction given to the Constitution or laws of the United States. Gully v. First National Bank, 299 U.S. 109 (1936); Prairie Band of the Pottawatamie Tribe of Indians v. Puckkee, 321 F. 2d 767 (10th Cir. 1963).

15. That, jurisdiction does not exist under 28 U.S.C., § 1331, as no substantial question arises under the

treaties and laws of the United States, especially, as plaintiffs claim, under the treaty with the Shoshone creating the Wind River Indian Reservation, 15 Stat. 673 (1868); for without a more clearly expressed provision, it cannot be assumed that Congress intended to impose a servitude upon the land within the reservation without requiring the consent of the tribe or Secretary of the Interior, and without payment of compensation for the taking. See Bennett County, South Dakota v. United States, above, at 15. As stated above, any effect that this treaty might have on the rights claimed by plaintiffs should be determined administratively.

16. That, plaintiffs allege, inter alia, that a cause of action is stated pursuant to 42 U.S.C. §§ 1983 and 1985; and, that, jurisdiction is conferred by 28 U.S.C., § 1343.

17. That, it is fundamental that 42 U.S.C., § 1983, does not support a cause of action unless it is shown that there was a deprivation of one's civil rights by a person acting under color of law of a State or territory. Loncassion v. Leekity, 334 F. Supp. 370 (D. N.Mex. 1971). It has not been shown that any of the defendants were acting under color of any statute or ordinance of any State or Territory. There was no state action. The Court, thus, does not reach the question of whether any constitutional rights of the plaintiffs were, in fact, violated.

18. That, 42 U.S.C., § 1985, the Ku Klux Klan Act, provides a cause of action where persons conspire to deny another the equal enjoyment of rights secured by law to all. Griffin v. Breckenridge, 403 U.S. 88 (1971). The defendant Bonatsies, or any of the other defendants, in blockading the road, did not deny plaintiffs equal protection of the laws, as there was no state action involved, so as to invoke the provisions of the Fourteenth Amendment. Nat'l. Federation of Ry. Workers v. National Mediation Board, 110 F. 2d 529 (D.C. Cir. 1940). The

provisions of the Fourteenth Amendment, in fact, do not apply to Indian Tribes. See Legislative History of 25 U.S.C.A., § 1302, at 2 U.S. Code Cong. and Ad. News 1864 (90th Cong. 1968).

19. That, plaintiffs have not been denied equal protection of the laws; for if anything, they may have been denied due process, but this the Court does not reach, nor does 42 U.S.C., § 1985, reach a conspiracy to deny a person due process of law.

20. That, as no conspiracy mentioned in 42 U.S.C.A., § 1985, or a conspiracy to violate 42 U.S.C.A., § 1983, was proved or attempted to be proved, the claim of jurisdiction pursuant to 28 U.S.C., § 1343, must fail. Rincon Band of Mission Indians v. County of San Diego, 495 F. 2d 1 (9th Cir. 1974).

21. That, the officials herein named as defendants to this action were acting within the outer perimeter of their statutory authority, pursuant to their statuory and regulatory duties. Therefore, the suit against these officials is in reality an unconsented suit against the United States barred by the doctrine of sovereign immunity. The Tewa Tesuque v. Morton, No. 73-1817 (10th Cir., filed June 12, 1974). As such, the officials should be dismissed as parties-defendants.

22. That, the matter in controversy is not one that comes within the purview of 28 U.S.C., § 1353; and the subject of this litigation does not confer jurisdiction under the aforementioned section on this Court.

23. That, plaintiffs are not the proper parties to institute an action pursuant to 25 U.S.C.A., § 357, nor is the roadway sought for a public purpose.

24. That, the Indian Civil Rights Act, 25 U.S.C.A., 1302(8), as urged by plaintiffs, does not confer jurisdiction as there was no denial of equal protection as no

rights of plaintiffs were violated; and inasmuch as it does not affect the powers given to the Secretary of the Interior by Congress, it does not permit an evasion of the proper procedures to be followed in obtaining a right-of-way. Groundhog v. Keeler, 442 F. 2d 674 (10th Cir. 1971). Plaintiffs have not been denied equal protection of any tribal laws. Defendants have only sought compliance with such laws.

25. That, this Court will retain jurisdiction over this subject matter, thereby affording plaintiffs an opportunity to exhaust their administrative remedies and, after the completion of the administrative remedies, if required to do so, this Court will give further attention to the matters set forth in these Findings of Fact and Conclusions of Law.

26. That, an order shall be entered forthwith denying plaintiffs' prayer for declaratory judgment and permanent injunction.

Dated this 11th day of July, 1974.

/s/ Ewing T. Kerr
EWING T. KERR
Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C74-74

DRY CREEK LODGE, INC., a Wyoming Corporation, Its Officers and Directors, ALBERT C. COOK, ELIZABETH P. COOK, THOMAS BURLINGHAM, BENJAMIN MILLER, ROBERT MILLER, RAY NIEDO, ROSE NIEDO, and BERNICE MILLER,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, ROGERS MORTON, Secretary of the Interior, JAMES CANNON, Area Director of Bureau of Indian Affairs, Billings, Montana; CLYDE HOBBS, Superintendent, Wind River Indian Reservation, Fort Washakie, Wyoming; ARCHIE W. KEEP, as Special Agent, Wind River Indian Reservation, Fort Washakie, Wyoming, ARAPAHOE and SHOSHONI TRIBES, and the JOINT BUSINESS COUNCIL OF THE ARAPAHOE AND SHOSHONI TRIBES, JOE ENGAVO, ALFRED MCADAMS, ALFRED WARD, JAMES POGUE, ENOS ENOS, STARR WEED, JESS MILLER, ARNOLD HEADLEY, JOHN WARREN, FELIX GROSBECK, HUGH FRIDAY, ERNEST HANWAY, Individually, and as Members of the Joint Business Council of the Shoshoni and Arapahoe Tribes; MRS. LUCY BONATSIE, HELENE BONATSIE, PETERSON BERNATSIE, IRVING BONATSIE, DEATRICE BONATSIE, WAYLAND BONATSIE, Heirs of the Estate of Ed Bonatsie, Deceased,

Defendants.

JUDGMENT OF DISMISSAL

This cause came on for hearing on the motion of plaintiffs for a preliminary injunction; on the motions of the defendants to dismiss for lack of jurisdiction and for fail-

ure of the amended complaint to state a claim for relief; and on the motion of the non-Federal defendants to dissolve the temporary restraining order entered in this cause on May 21, 1974; and the Court having received evidence on June 7, 1974, and having considered the entire record in this case, having made and filed its findings of fact and conclusions of law, and having on the 11th day of July, 1974, denied the prayer for declaratory judgment and the application for permanent injunction, and retaining jurisdiction over the matter to afford plaintiffs an opportunity to exhaust their administrative remedies as provided by law; and the Court having given further consideration to said matter; NOW, THEREFORE,

IT IS ORDERED that the amended complaint, together with the several causes alleged therein, be, and the same are hereby dismissed with prejudice, the parties to pay their own costs.

Dated this 29th day of July, 1974.

EWING T. KERR
Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1546

[May 9, 1975]

DRY CREEK LODGE, INC., a Wyoming Corporation, Its Officers and Directors, ALBERT C. COOK, ELIZABETH P. COOK, THOMAS BURLINGHAM, BENJAMIN MILLER, ROBERT MILLER, RAY NIEDO, ROSE NIEDO, and BERNICE MILLER,

Plaintiffs-Appellants,

v.

THE UNITED STATES OF AMERICA, ROGERS MORTON, Secretary of the Interior, JAMES CANNON, Area Director of Bureau of Indian Affairs, Billings, Montana; CLYDE HOBBS, Superintendent, Wind River Indian Reservation, Fort Washakie, Wyoming; ARCHIE W. KEEP, as Special Agent, Wind River Indian Reservation, Fort Washakie, Wyoming, ARAPAHOE and SHOSHONE TRIBES, and the JOINT BUSINESS COUNCIL OF THE ARAPAHOE AND SHOSHONE TRIBES, JOE ENGAVO ,ALFRED MCADAMS, ALFRED WARD, JAMES POGUE, ENOS ENOS, STARR WEED, JESS MILLER, ARNOLD HEADLEY, JOHN WARREN, FELIX GROSBECK, HUGH FRIDAY, ERNEST HANWAY, Individually, and as Members of the Joint Business Council of the Shoshone and Arapahoe Tribes; MRS. LUCY BONATSIE, HELENE BONATSIE, PETERSON BONATSIE, IRVING BONATSIE, DEATRICE BONATSIE, WAYLAND BONATSIE, Heirs of the Estate of Ed Bonatsie, Deceased,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Wyoming

(D.C. No. C74-74)

G. L. Spence, Casper, Wyo. (John R. Hursh, Hamilton & Hursh, P. C., Riverton, Wyo., on the brief), for plaintiffs-appellants.

Marvin J. Sonosky, Washington, D.C. (Glen A. Wilkinson, Washington, D.C. and William J. Thomson, II, Cheyenne, Wyo., on the brief), for non-federal defendants-appellees.

Larry A. Boggs, Atty., Dept. of Justice, Washington, D.C. (Wallace H. Johnson, Asst. Atty. Gen., Richard V. Thomas, U.S. Atty., Cheyenne, Wyo., and George R. Hyde, Atty., Dept. of Justice, Washington, D.C., on the brief), for federal defendants-appellees.

Before SETH, McWILLIAMS and DOYLE, Circuit Judges.

WILLIAM E. DOYLE, Circuit Judge.

The primary question in this case is whether the trial court had subject matter jurisdiction. Following a hearing in which a preliminary injunction was sought and at which motions for dismissal and for summary judgment were filed on behalf of the federal defendants and the non-federal defendants, respectively, the court not only ruled that there was no jurisdiction but also ruled that there was no case on the merits. Some evidence was adduced and thus there was somewhat of a summary trial held at a preliminary stage of the proceedings.

This is an unusual case. The plaintiff claims a right of access to his property, on which he had built an inn or

hotel (a stopping off place for persons entering wilderness areas), from the main road on a three and one-half mile dirt road which crosses Indian properties held in trust by the United States for the benefit of individual Indians and the Shoshone and Arapahoe tribes. Appellants had never owned a right-of-way, but had been until the present allowed free use of the dirt road in question by permission of the six members of the Bonatsie family, who are members of the Shoshone tribe, and the other landowners.

The events which brought about the crisis leading to the lawsuit started in early 1974 when appellants built a small lodge having dining and drinking facilities on their property. This lodge was financed in part at least by the United States Small Business Administration. Its representatives had expressed some interest in the fact that there was not as a matter of right an access to the lodge. Counsel for appellants assured the SBA that this was no problem. The superintendent of the Wind River Indian Reservation testified that he advised the appellants that it would be necessary for them to obtain a formal right-of-way from the Bonatsies in order to have a right of egress and ingress. Notwithstanding the right-of-way problem, the lodge was completed, but on the day of the formal opening the members of the Bonatsie family together with the Joint Business Council of the tribes plus the superintendent of the Reservation erected a barricade across the road and stopped traffic in both directions. It is undisputed that employees of the Bureau of Indian Affairs aided in manning the barricade.

All of the foregoing led to the filing of the instant lawsuit in the United States District Court for the District of Wyoming. Named as defendants were the Secretary of the Interior, the area director of the Bureau of Indian Affairs, the superintendent of the Reservation, a special agent of the Reservation, the Indian tribes

together with the Joint Business Council of the tribes and its individual members, plus the Bonatsie family. Originally the court issued an ex parte restraining order as a result of which the barricade was removed. This order was entered May 21, 1974. On June 3 the non-federal defendants moved for summary judgment and the federal defendants moved to dismiss. Both movants raised the alleged lack of jurisdiction. On June 4, 1974, the plaintiffs moved for a preliminary injunction, and on June 7, 1974, a hearing was held on this motion, but prior to this an amended complaint had been filed which set forth the plaintiffs' contentions as to jurisdiction in some detail. At the June 7, 1974 hearing the plaintiffs maintained that the only issue before the court was the plaintiffs' request for a preliminary injunction together with the question as to the jurisdiction of the court to entertain the cause and motion. Counsel for appellants objected to any hearing on the merits. At the conclusion of the proceedings the parties agreed that they would maintain the status quo until the court ruled. The judgment of the court which was entered on July 11, 1974 denied the application for permanent injunction and denied also the claim seeking a declaratory judgment. The court retained jurisdiction so as to allow the plaintiffs to exhaust their remedies with the tribe and the Department of the Interior. However, without further notice the court proceeded to dismiss the cause of action on July 29, 1974. It is the propriety of these actions which we must review.

Plaintiffs contend:

1. The court erred in considering the merits and also its jurisdiction over the case without giving notice of intent to hear the merits in accordance with the Rules of Civil Procedure.

2. They maintain that it was error to issue what amounted to a summary judgment without giving the

requisite notice provided in Rule 56(c) of the Federal Rules of Civil Procedure.

3. They also contend that the court was in error in holding that it lacked jurisdiction and in denying the motion for preliminary injunction.

I.

Inasmuch as it appears from the record that the concern of the district court was with the question of jurisdiction to accept the cause and that this consideration affected, indeed governed, the rulings on the merits, it would seem to be proper first to inquire as to whether jurisdiction existed.

The complaint insofar as the United States and its agents are concerned alleges that the court had jurisdiction pursuant to 28 U.S.C. § 1331 to adjudicate their claims for a way of necessity and to issue a quiet title decree against the United States and the Indians as well, including the administrator of the estate of Ed Bonatsie.

A. Could the United States be a party?

At the outset we conclude that the trial court was correct in dismissing the claims as to the United States, because it had neither expressly nor impliedly consented to the suit.[1] The plaintiffs, however, allege that a consent was given (a waiver of immunity) as a result of enactment of 25 U.S.C. § 357, which in general provides that lands allotted to Indians may be condemned for any public purpose under the laws of the State or Territory where the land is located. Plaintiffs also point to a com-

[1] Dugan v. Rank, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963); Hawaii v. Gordon, 373 U.S. 57, 83 S.Ct. 1052, 10 L.Ed.2d 191 (1963); Malone v. Bowdoin, 369 U.S. 643, 82 S.Ct. 980, 8 L.Ed.2d 168 (1962); Larson v. Domestic & Foreign Corp., 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); Williams v. United States, 289 U.S. 553, 53 S.Ct. 751, 77 L.Ed. 1372 (1933).

panion Wyoming statute which allows one who has no outlet to a public road to obtain a private road through the Board of County Commissioners of his county. But we fail to see that either the federal statute or the Wyoming statute (Wyoming Stat. Ann. § 24-92) creates the necessary waiver of sovereign immunity. If it could be said that there was a waiver contained in § 357, *supra*, it would extend only to condemnations for public purpose. The Wyoming statute applies only to condemnations for private purpose. The law is well settled that waiver of sovereign immunity is to be strictly construed, and it is plain that Congress did not give its consent to suits against it by private individuals seeking private roads.

B. Immunity of the individual government officers.

It is contended that the defendants Rogers Morton, James Cannon, Clyde Hobbs and Archie W. Keep are also immune from suit because they were performing their functions as officers of the United States.[2] If the action against the officers was based only on their failure to provide or extend a way of necessity, the immunity would have to be upheld as to them as well as the government.

The question is, however, whether the sovereign immunity which belongs to the government extends to the officers on these facts. Federal jurisdiction does extend to federal officials even in the absence of a consent when they have acted beyond their statutory authority or where they have acted in an unconstitutional manner. The complaint herein alleges that the officers acted without au-

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[2] *See* Dugan v. Rank, *supra*; Malone v. Bowdoin, *supra*; Larson v. Domestic & Foreign Corp., *supra*; National Indian Youth Council v. Bruce, 485 F.2d 97 (10th Cir. 1973); McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971); Chournos v. United States, 335 F.2d 918 (10th Cir. 1964).

thority or justification in maintaining the barricade. From the allegations of the complaint and the surrounding facts, it appears that the federal officers manned the barricades with the tribal councils and encouraged the latter to block access to plaintiffs' property. It is also alleged that the federal agents along with the other defendants conspired to deprive the plaintiffs of their civil rights in violation of 42 U.S.C. §§ 1983 and 1985 and that their rights are subject to vindication under 28 U.S.C. § 1343.

The trial court correctly ruled that the claim under § 1983 lacks merits because there is no showing that the defendants acted under color of state law, an essential requirement of the § 1983 suit. The court's dismissal of the § 1983 action was then correct.[3]

But this does not end the matter. There is a further contention that the court erred in dismissing plaintiffs' claim that the individual defendants other than the Secretary of the Interior conspired to deprive them of equal protection or equal privileges and immunities contrary to 42 U.S.C. § 1985. Here the presence or absence of state action is not a factor, for this provision embraces private conspiracies. *See* Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971). The plaintiffs' theory revealed in the complaint and at the hearing was that the blockade's purpose was deprivation of equal protection of the laws and of due process, and the plaintiffs maintain that they belong to a class which was the object of discrimination. The complaint also alleged that the blockade sought to block ingress and

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[3] *See* Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959); Williams v. Sisseton-Wahpeton Sioux Tribal Council, 387 F.Supp. 1194 (D.S.Dak. 1975); Loncassion v. Leekity, 334 F.Supp. 370 (D.N.Mex. 1971); Dodge v. Nakai, 298 F.Supp. 17 (D.Ariz. 1968); Toledo v. Pueblo de Jemez, 119 F.Supp. 429 (D.N.Mex. 1954).

egress of all persons, but this does not serve to dispose of the allegation that discrimination existed. It is true that the complaint does not detail the factual basis for this claim, but under the Rules of Civil Procedure detailed *evidence* need not be set forth in the complaint. *Cf.* Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

In holding that the court must entertain this claim we do not, of course, evaluate its merits. Inasmuch as there has not been a full-scale trial, the merits of the question are wide open and are to be determined from the evidence presented at a trial following discovery and other pretrial proceedings.

II.

A further ground for federal court jurisdiction advanced by plaintiffs is the constitutional tort doctrine enunciated in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). This was an aggravated search and seizure case in which federal agents invaded the plaintiffs' home by mistake and under color of authority as federal agents and conducted a narcotics search. Acting without a warrant, the officers entered and searched plaintiff's home. Arrest of the plaintiff was made and there was a threat to arrest the entire family. In the civil action against the agents the Fourth Amendment was invoked in the absence of a federal civil rights act. The district court dismissed the case on the ground that it did not state a cause of action. The court of appeals affirmed and the Supreme Court reversed. The question presented was whether the action could be entertained under the Fourth Amendment. The Court held that where rights under the Fourth Amendment have been violated "the courts will be alert to adjust their remedies so as to grant the necessary relief." The prior definitive case was the Supreme Court's decision in Bell

v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946). This was also a search and imprisonment case which alleged violation of federally protected constitutional rights. *Bell* was a pioneer decision which, although reserving the merits issue, recognized the power of the courts to entertain such a case and to fashion a remedy where it has not been provided by Congress. A necessity existed to redress injuries inflicted by federal officers contrary to the Constitution.

For our purpose the Bell v. Hood case and *Bivens* also recognize that the federal jurisdiction requirement is satisfied by allegations in the complaint, even though not specific, which describe the violation of constitutional rights.[4]

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[4] On the question of jurisdiction the Supreme Court through Justice Black distinguished between a decision on jurisdiction and one on the merits as follows:

> Though the mere failure to set out the federal or Constitutional claims as specifically as petitioners have done would not always be conclusive against the party bringing the suit, where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit. Thus allegations far less specific than the ones in the complaint before us have been held adequate to show that the matter in controversy arose under the Constitution of the United States. Wiley v. Sinkler, 179 U.S. 58, 64, 65, 21 S.Ct. 17, 20, 45 L.Ed. 84; Swafford v. Templeton, 185 U.S. 487, 491, 492, 22 S.Ct. 783, 784, 785, 46 L.Ed. 1005. The reason for this is that the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy.
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> Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint

Unless, then, it can be said that the allegations in the case at bar are patently insubstantial and frivolous, the plaintiffs are entitled to proceed beyond the threshold of the court and have their case heard on its merits. It cannot be said from a reading of the allegations of the complaint that plaintiffs' claim is wholly insubstantial and frivolous. We are cognizant of the fact that the claim at bar differs from those which were litigated in Bell v. Hood and in *Bivens*, but those decisions did not limit a constitutional action to a Fourth Amendment violation, and indeed the courts which have considered claims deriving from other violations of the Constitution have applied the doctrine in other areas.[5]

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states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. Swafford v. Templeton, 185 U.S. 487, 493, 494, 22 S.Ct. 783, 785, 786, 46 L.Ed. 1005; Binderup v. Pathe Exchange, 263 U.S. 291, 305-308, 44 S.Ct. 96, 98-99, 68 L.Ed. 308. The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous. The accuracy of calling these dismissals jurisdictional has been questioned. The Fair v. Kohler Die & Specialty Co., supra, 228 U.S. at page 25, 33 S.Ct. at page 411, 57 L.Ed. 716. But cf. Swafford v. Templeton, supra.

327 U.S. at 681, 682, 66 S.Ct. at 775.

[5] There are some decisions which recognize the existence of a civil action to redress the violation of federal rights other than under the Fourth Amendment. *See, for example*, United States ex rel. Moore v. Koelzer, 457 F.2d 892 (3d Cir. 1972); Howard v. Warden, Petersburg Reformatory, 348 F.Supp. 1204 (E.D.Va. 1972). *But see* Moore v. Schlesinger, 384 F.Supp. 163 (D.Colo. 1974).

We hasten to add that we do not judge either the sufficiency of the complaint or the case's intrinsic merits. We do hold that the allegations sufficiently allege the existence of federal jurisdiction entitling the plaintiffs to have their day in court.

III.

The final question is whether the court erred in dismissing plaintiffs' claims against the tribes, the Joint Business Council and its agents. The contention is that there was jurisdiction under 25 U.S.C. § 1302, the Indian Civil Rights Act, which in pertinent part reads:

> No Indian tribe in exercising powers of self-government shall—. . .
>
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

The complaint seeks injunctive relief against the tribes and the Tribal Councils from interfering by blockading the road and thus preventing the plaintiffs from making use of the connecting road. Appellants say that this violates their rights under the due process and equal protection clauses of the Act. Section 1302, *supra*, does not by its terms extend to the district court's jurisdiction over claims arising under this provision. However, the courts which have considered the question have held that 28 U.S.C. § 1343(4) provides a remedy in federal court for the prosecution of these deprivations.[6]

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[6] Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F.2d 1231 (4th Cir. 1974); Thompson v. Tonasket, 487 F.2d 316 (9th Cir. 1973), cert. denied, 416 U.S. 954, 94 S.Ct. 1967, 40 L.Ed.2d 304 (1974); Brown v. United States, 486 F.2d 658 (8th Cir. 1973); Johnson v. Lower Elwha Tribal Community, 484 F.2d 200 (9th Cir. 1973); Daly v. United States, 483 F.2d 700 (8th Cir. 1973); Melvin White Eagle v. Philomene One Feather, 478 F.2d 1311 (8th Cir. 1973); Luxon v. Rosebud Sioux Tribe of South Dakota, 455 F.2d 698 (8th Cir. 1972); Williams v. Sisseton-Wahpeton

Our court has had this general question before it on three occasions, but has not reached the present issue. Slattery v. Arapahoe Tribal Council, 453 F.2d 278 (10th Cir. 1971) and Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971). It was held in *Groundhog* that there were insufficient jurisdictional facts to bring the case within the provisions of § 1302. In McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974), this court refrained from ruling on the applicability of § 1302 because the plaintiffs had not exhausted tribal remedies.[7]

Sioux Tribal Council, 387 F.Supp. 1194 (D.S.Dak. 1975); White v. Tribal Council, Red Lake Band of Chippewa Indians, 383 F.Supp. 810 (D.Minn. 1974); Means v. Wilson, 383 F.Supp. 378 (D.S.Dak. 1974); Hickey v. Crow Creek Housing Auth., 379 F.Supp. 1002 (D.S.Dak. 1974); McCurdy v. Steele, 353 F.Supp. 629 (D.Utah 1973); rev'd on other grounds, 506 F.2d 653 (10th Cir. 1974); Seneca Constitutional Rights Organization v. George, 348 F.Supp. 48 (W.D.N.Y. 1972); Solomon v. LaRose, 335 F.Supp. 715 (D. Neb. 1971); Loncassion v. Leekity, 334 F.Supp. 370 (D.N.Mex. 1971); Spotted Eagle v. Blackfeet Tribe of Blackfeet Indian Reservation, 301 F.Supp. 85 (D.Mont. 1969). *But see* Pinnow v. Shoshone Tribal Council, 314 F.Supp. 1157 (D.Wyo. 1970), aff'd on other grounds sub nom. Slattery v. Arapahoe Tribal Council, 453 F.2d 278 (10th Cir. 1971). *Cf.* Yellow Bird v. Oglala Sioux Tribe of South Dakota, 380 F.Supp. 438 (D.S.Dak. 1974); Lefthand v. Crow Tribal Council, 329 F.Supp. 738 (D.Mont. 1971).

[7] In the present case a decision on the question is unavoidable, because of its procedural posture. Since only three days notice was given to the plaintiffs that the defendants were seeking dismissal at the preliminary injunction hearing, the only issue properly before the trial court was its subject matter jurisdiction. The defendants raised the issue of exhaustion of administrative remedies at the hearing and the court ruled that the plaintiffs had failed to exhaust. However, the "long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted" does not go to the subject matter jurisdiction of the court. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51, 58 S.Ct. 459, 82 L.Ed. 638 (1938); *see* McKart v. United States, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194

From an examination of the authorities, we are of the opinion that 25 U.S.C. § 1302, which recognizes the right to be protected against deprivation of due process and equal protection of the laws, furnishes a jurisdictional basis which justifies the federal court's entertaining of the case. The plaintiffs are non-Indians and so there remains the question whether an action under the Indian Bill of Rights contemplates an action by one who is not an Indian. There is little law on this subject. The cases that have considered § 1302 have held that in view of the legislative history, it applies to non-Indians as well as Indians who are under the jurisdiction of the tribe.

A district court case from Arizona, Dodge v. Nakai, 298 F.Supp. 17 (D. Ariz. 1968), involved a non-Indian plaintiff's rights against the tribal council. The court held that it had jurisdiction over the controversy between the non-Indian against the tribal council.

In Hickey v. Crow Creek Housing Authority, 379 F. Supp. 1002 (D. S. Dak. 1974), a non-Indian had entered into a contract with the tribal housing authority to drill three wells. In an action under the Indian Civil Rights Act, it was alleged that he had been deprived of due process. The court recognized § 1302 to be available to non-Indians as well as Indians, but it further held that the complaint failed to state sufficient facts to give the court jurisdiction under 28 U.S.C. § 1343(4).

An Eighth Circuit decision contains a dictum which says that § 1302(8) applies to any person within tribal jurisdiction. Schantz v. White Lightning, 502 F.2d 67, 70 n.5 (8th Cir. 1974). The legislative history which has been referred to is discussed fully in the opinion of Judge

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(1969); 3 K. Davis, Administrative Law Treatise § 20.02. It is clear from the transcript of the preliminary injunction hearing that plaintiffs' counsel was not prepared to argue the exhaustion point. Fairness requires that he be given that opportunity.

Craig in Dodge v. Nakai, *supra*. The court there concluded that Congress intended § 1302 to apply to all persons.[8] It is indeed difficult to reach any other conclusion since by its terms it extends to all persons.

The allegations of the complaint are to the effect that plaintiffs have a property right in the access road and that the part of the road which was blocked was within tribal jurisdiction. It was also alleged that the tribe summoned the federal agents to maintain and supervise the barricade of that road, and that this constituted a violation of the Indian Civil Rights Act. We recognize that this may not be the strongest case imaginable under the Indian Civil Rights Act, but determining the merits

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[8] Initially, legislation was proposed that imposed upon Indian tribes the same limitations and restraints as those which are imposed on the federal government by the United States Constitution. Objections to this whole scale application of the Bill of Rights to Indian tribes were voiced in hearings conducted in June, 1965. The Department of the Interior offered a substitute bill that spelled out in specific terms the rights Indians would possess in their relationships with tribal governments. The substitute bill specifically referred to "American Indians" in delineating the rights to be established. *See* Hearings on the Constitutional Rights of American Indians Before the Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, 89th Cong., 1st Sess., at 5, 317-18 (1965). In May, 1966, the Department of the Interior submitted supplemental testimony and a revision of the substitute bill that was intended to establish rights for all persons who may be subject to the jurisdiction of tribal governments, whether Indians or non-Indians. *See* Summary Report on the Constitutional Rights of American Indians of the Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, 89th Cong., 2d Sess., at 9-10 (1966). At this point, along with immaterial changes, the term "any person" was substituted for the term "American Indian" throughout the bill that eventually became Title II. That language remained in the bill up to and including the time of its enactment into law.

Dodge v. Nakai, *supra*, at 24.

is not our function. We are, however, of the opinion that the allegations are sufficient to give the court jurisdiction to hear the merits and we say that it should be a regular trial and not a summary hearing.

We have not failed to consider the contention of the tribes and the Joint Council that they are protected from suit by the doctrine of tribal immunity, but the cases which have considered § 1302 have held that this enactment is a waiver by Congress of this immunity.[9]

From the fact that the lower court had jurisdiction over the tribes and the Joint Business Council, it does not follow that it had jurisdiction over the individual members of the tribes and the Council or over the individual federal agents. Section 1302 speaks only to tribe action, and it has been held that it does not give rise to jurisdiction under 28 U.S.C. § 1343 over individual tribal members.[10] Thus, the trial court did not err in holding that it lacked jurisdiction to award damages or declaratory relief against the individual defendants. Of course, to the extent that individuals are acting as agents for the tribes or the Council, the court does possess jurisdiction to extend injunctive relief to the individual agents.[11]

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[9] *See* Brown v. United States, 486 F.2d 658 (8th Cir. 1973); Johnson v. Lower Elwha Tribal Community, 484 F.2d 200 (9th Cir. 1973); Daly v. United States, 483 F.2d 700 (8th Cir. 1973); McCurdy v. Steele, 353 F.Supp. 629 (D.Utah 1973); Seneca Constitutional Rights Organization v. George, 348 F.Supp. 48 (W.D.N.Y. 1972); Loncassion v. Leekity, 334 F.Supp. 370 (D.N.Mex. 1971). *But see* Pinnow v. Shoshone Tribal Council, 314 F.Supp. 1157 (D. Wyo. 1970), aff'd on other grounds sub nom. Slattery v. Arapahoe Tribal Council, 453 F.2d 278 (10th Cir. 1971).

[10] *See* Means v. Wilson, 383 F.Supp. 378 (D.S.Dak. 1974); Spotted Eagle v. Blackfeet Tribe of Blackfeet Indian Reservation, 301 F.Supp. 85 (D.Mont. 1969); Dodge v. Nakai, 298 F.Supp. 17 (D.Ariz. 1968).

[11] The plaintiffs assert as an additional basis for jurisdiction over the defendants 28 U.S.C. § 1353. However, this Circuit has

IV.

Where, as here, jurisdiction of the court is invoked by plaintiffs on grounds which if true spell out the existence of federal jurisdiction, the cause must be entertained for the purpose of fully determining the merits either by way of motion or by trial. *See* Bell v. Hood, *supra*, and Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, *supra*. *See also* Wheeldin v. Wheeler, 373 U.S. 647, 83 S.Ct. 1441, 10 L.Ed.2d 605 (1963).[12]

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previously held that § 1353 was enacted for the narrow purpose of giving district courts jurisdiction over claims of right to original allotments or allotments in the first instance. *See* Prairie Band of Pottawatomie Tribe of Indians v. Puckkee, 321 F.2d 767 (10th Cir. 1963). This is not such a case.

[12] In this case the opinion of the Court was by Justice Douglas. The plaintiff had been subpoenaed before the House Un-American Activities Committee. These subpoenas had been issued in blank and the agent had filled in the plaintiff's name. The suit was brought under the Constitution just as Bell v. Hood and *Bivens*. On the issue of jurisdiction the Court simply said:

> We agree with the Court of Appeals in its first opinion (280 F.2d 293) that on the face of the complaint the federal court had jurisdiction. As we stated in Bell v. Hood, 327 U.S. 678, 685, 66 S.Ct. 773, 777, 90 L.Ed. 939, "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the district court has jurisdiction." And see Bock v. Perkins, 139 U.S. 628, 630, 11 S.Ct. 677, 678, 35 L.Ed. 314.
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> But on the undisputed facts, as they appear on argument of the case, no federal cause of action can be made out. Dawson's main reliance is on the Fourth Amendment, which protects a person against unreasonable searches and seizures. Its violation, he contends, occurred when an unauthorized subpoena was served on him. But there was neither a search nor a seizure of him. He was neither arrested nor detained pursuant to any subpoena; nor, so far as the complaint discloses, did he respond to the subpoena and either testify or refuse to testify;

As has been demonstrated above, the amended complaint sufficiently invoked the jurisdiction of the federal court, whereby the court was required to deal with the claims asserted on their merits. The fact that it appeared to the trial court that the cause as a whole lacked merit did not justify the procedures which were taken.

As we view it, the hearing on preliminary injunction became a hearing on the merits. This was done without notice pursuant to Rule 65(a)(2) and without giving the requisite 10 days notice required by Rule 56(c), Federal Rules of Civil Procedure. We conclude that if a case had been wholly found lacking in procedural basis so as to justify dismissal as being frivolous, this summary disposition might have been permissible, but as we have shown above, such an out of hand disposition was not appropriate at bar.

Moreover, notice is an essential prerequisite to an order to change a hearing on preliminary injunction to a hearing on the merits.[13]

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nor was the subpoena used to cite him for contempt. *Cf.* Williams v. United States, 341 U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774. In short, the facts alleged do not establish a violation of the Fourth Amendment. And the provisions of the Civil Rights Act are clearly inapplicable to this kind of case. *See* R.S. §§ 1979, 1980, 42 U.S.C. §§ 1983, 1985; Tenny v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019; Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492.

373 U.S. at 649, 83 S.Ct. at 1444.

[13] *See* S. E. C. v. Pearson, 426 F.2d 1339 (10th Cir. 1970); Sooner State Dairies, Inc. v. Townley's Dairy Co., 406 F.2d 1328 (10th Cir. 1969). *See also* Pughsley v. 3750 Lake Shore Drive Cooperative Bldg., 463 F.2d 1055 (7th Cir. 1972); Eli Lilly & Co. v. Generix Drug Sales, Inc., 460 F.2d 1096, 1106 (5th Cir. 1972); Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971); T. M. T. Trailer Ferry, Inc. v. Union de Tronquistas de Puerto Rico, Local 901, 453 F.2d 1171 (1st Cir. 1971); Brooks v. Nacrelli, 415 F.2d 272 (3d Cir. 1969); 7 J. Moore, Moore's Federal

True, the plaintiffs received three days notice that the defendants were moving for a dismissal, but the hearing at bar was more than one on motion to dismiss. Not only was it a summary judgment issue, the court heard testimony also. The 10 day notice provision of Rule 56 alone would prohibit this.[14]

As to the matter of dismissal for lack of jurisdiction, we finally point out that a question like the plaintiffs' inability to sue the United States because of sovereign immunity would be appropriately dismissed on a summary basis. We must conclude that the case called for a trial or hearing on the merits, and that it was improper for the court to determine such issues as exhaustion of administrative remedies and a determination that the defendants were entitled to prevail on the merits of the claim.[15]

Practice ¶ 65.04[4] at 65-67 (1972); 11 C. Wright and A. Miller, Federal Practice and Procedure § 2950 at 486 (1973).

Some courts have allowed consolidation without notice in special circumstances. *See* Bright v. Nunn, 448 F.2d 245 (6th Cir. 1971); Singleton v. Anson County Bd. of Educ., 387 F.2d 349 (4th Cir. 1967); Williamson v. Hampton Management Co., 339 F.Supp. 1146 (N.D.Ill. 1972); 11 C. Wright & A. Miller, *supra*, § 2950 at 490-91.

[14] *See* Adams v. Campbell County School Dist., 483 F.2d 1351 (10th Cir. 1973); Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 480 F.2d 607 (10th Cir. 1973); Santiago v. Corporacion de Renovacion Urbana, 453 F.2d 794 (1st Cir. 1972); Georgia Southern & F. Ry. Co. v. Atlantic Coast Line R. Co., 373 F.2d 493 (5th Cir. 1967); 10 C. Wright & A. Miller, *supra*, § 2719 at 458; 11 C. Wright & A. Miller, *supra*, § 2950 at 492.

[15] In Conclusion of Law No. 4 the court found on the merits that the Cooks did not have a right of way by necessity, because other access was available. In Conclusions of Law Nos. 19 and 24 the court held that the Plaintiffs had not been deprived of equal protection of federal or tribal laws. In Conclusions of Law Nos. 8-12 the court held that the Plaintiffs had not exhausted their administrative remedies.

In sum, we conclude that the cause is not so lacking in merit as to justify a summary disposition. Discovery of the facts and full presentation thereof were essential.

Accordingly, then, the judgment of the district court is reversed and the cause is remanded for further proceedings consistent with the views expressed herein.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

C 74-74A

DRY CREEK LODGE, INC., a Wyoming corporation, its Officers and Directors, ALBERT C. COOK, ELIZABETH C. COOK, THOMAS BURLINGHAM, BENJAMIN MILLER, ROBERT MILLER, RAY NIEDO, ROSE NIEDO, BERNICE MILLER, JOHN GUINA, ZELLA GUINA, EMMETT WASHAKIE, BEATRICE WASHAKIE, ETHELENE POTTER and DAVID MILLER,

Plaintiffs,

v.

JAMES CANAN, Area Director of Bureau of Indian Affairs, Billings, Montana; CLYDE HOBBS, Superintendent, Wind River Indian Reservation, Fort Washakie, Wyoming; ARCHIE W. KEEP, as Special Agent, Wind River Indian Reservation, Fort Washakie, Wyoming; ARAPAHOE AND SHOSHONE TRIBES, MRS. LUCY BONATSIE, HELENE BONATSIE, BEATRICE BONATSIE, IRVING BONATSIE, PETERSON BONATSIE, WAYLAND BONATSIE, Heirs of the Estate of Ed Bonatsie, Deceased, and RALPHAELITA STUMP,

Defendants.

JUDGMENT

In the above-entitled matter the court, on the 19th day of April, 1977, heard the arguments of counsel on defendants' motion for summary judgment. The court carefully examined the briefs and on the 26th day of

April, 1977, entered its order dismissing Counts IV and V of the six-count amended complaint. The trial of the remaining four counts began before a jury on the 2nd day of May, 1977. Witnesses were sworn and testified for both sides and counsel made their arguments.

In the course of trial the court ruled that Count VI would be heard and determined by the court itself, based upon the evidence sumitted on that issue and upon the arguments of counsel on the law. Upon the arguments being made, the court found, as noted more fully in the record, that under the facts and law applicable that the road in question was not a public road. The court therefore dismissed Count VI.

Upon the conclusion of the evidence in the case, defendants made and argued motions for directed verdict. The court granted the motion as to Count II as to all defendants. Further, the court granted the motion by dismissing out defendant James Canan and plaintiffs Ray Niedo, Rose Niedo, John Guina, Zella Guina, Emmett Washakie, Beatrice Washakie, and Ethelene Potter, for the reasons stated in the record.

The court granted the motion for directed verdict as to the claim of the plaintiffs for deprivation of property without due process in Count I, and also granted the same as to plaintiffs' claim of denial of equal protection and deprivation of property without due process in Count III.

The remaining issues—denial of equal protection and deprivation of liberty without due process against the defendant Tribes in Count I, and deprivation of liberty without due process in Count III against defendants Archie W. Keep and Clyde Hobbs—were presented to the jury for their determination.

The jury entered the following verdict. On the claim for deprivation of liberty without due process of law

under Count I, the jury found for each of the plaintiffs and against the defendant Tribes.

On the claim for deprivation of liberty without due process of law under Count III, the jury found for the defendants Clyde Hobbs and Archie W. Keep and against the plaintiffs, no cause of action.

On the claim for denial of equal protection of the laws under Count I, the jury found for the plaintiffs Albert C. Cook and Elizabeth P. Cook and against the defendant Tribes. The jury found for the defendant Tribes and against the remaining plaintiffs, no cause of action on the claim for denial of equal protection.

Based on the jury's findings as set forth hereinabove the jury awarded damages to the plaintiffs and against the defendant Tribes in the following amounts: Albert C. Cook, $250,000; Elizabeth P. Cook, $250,000; Thomas Burlingham, $5,000; Benjamin Miller, $5,000; Bernice Miller, $5,000; David Miller, $5,000; and Robert Miller, $5,000.

Based upon the foregoing rulings and the verdict of the jury, the court enters judgment as follows:

IT IS ORDERED AND ADJUDGED as follows that:

1. On defendants' motions for summary judgment Counts IV and V are dismissed with prejudice.

2. On defendants' motions for directed verdicts Count II is dismissed with prejudice.

3. On the defendants' motions for directed verdict the case against defendant James Canan is dismissed with prejudice.

4. Further, on the basis of said motions, the case is dismissed as to the plaintiffs Ray Niedo, Rose Niedo, John Guina, Zella Guina, Emmett Washakie, Beatrice Washakie and Ethelene Potter, with prejudice.

5. As to Count VI, which was tried to the court, based upon the findings and the ruling of the court made upon the record, Count VI is dismissed with prejudice.

6. On defendants' motions for directed verdict the court dismissed with prejudice plaintiffs' claims under Count I for deprivation of property without due process and of the claims of denial of equal protection and deprivation of property without due process in Count III, with prejudice.

7. Based on the verdict of the jury,

a) The court enters judgment in favor of defendants Clyde Hobbs and Archie Keep, no cause of action on plaintiffs' complaint in Count III wherein plaintiffs claim deprivation of liberty without due process of law.

b) The court enters judgment for the plaintiffs Albert C. Cook for $250,000 and Elizabeth P. Cook for $250,000 against the defendant Tribes, jointly and severally, on plaintiffs' claim of deprivation of liberty without due process and of denial of equal protection of laws under Count I.

c) The court enters judgment for the plaintiffs Thomas Burlingham, Benjamin Miller, Bernice Miller, David Miller, and Robert Miller, $5,000 each against the defendant Tribes, jointly and severally, on plaintiffs' claim of deprivation of liberty without due process, and no cause of action on their claim for denial of equal protection under Count I.

DATED this 18 day of July, 1977.

/s/ Aldon J. Anderson
ALDON J. ANDERSON
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

C74-74A

DRY CREEK LODGE, INC., a Wyoming corporation, its Officers and Directors, ALBERT C. COOK, ELIZABETH C. COOK, THOMAS BURLINGHAM, BENJAMIN MILLER, ROBERT MILLER, RAY NIEDO, ROSE NIEDO, BERNICE MILLER, JOHN GUINA, ZELLA GUINA, EMMETT WASHAKIE, BEATRICE WASHAKIE, ETHELENE POTTER and DAVID MILLER,

Plaintiffs,

v.

JAMES CANAN, Area Director of Bureau of Indian Affairs, Billings, Montana; CLYDE HOBBS, Superintendent, Wind River Indian Reservation, Fort Washakie, Wyoming; ARCHIE W. KEEP, as Special Agent, Wind River Indian Reservation, Fort Washakie, Wyoming; ARAPAHOE AND SHOSHONE TRIBES, MRS. LUCY BONATSIE, HELENE BONATSIE, DEEATRICE BONATSIE, IRVING BONATSIE, PETERSON BONATSIE, WAYLAND BONATSIE, Heirs of the Estate of Ed Bonatsie, Deceased, and RALPHAELITA STUMP,

Defendants.

ORDER RULING ON MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT, FOR NEW TRIAL OR FOR REMITTITUR

Upon the Motion of defendant, Arapahoe and Shoshone Tribes, for a Judgment notwithstanding the verdict, for a new trial, or remittitur, coming on for hearing before the Court on February 3, 1978, at the hour of

2:00 p.m.; plaintiffs, Albert C. Cook and Elizabeth P. Cook, having appeared in person and with their attorney, John R. Hursh, the other plaintiffs having appeared through their attorney, John R. Hursh; the defendant, Arapahoe and Shoshone Tribes having appeared through their original counsel of record, Marvin J. Sonosky, who requested but was not granted leave to participate in the hearing, and through their attorney, W. W. Reeves; briefs having previously been filed; and the Court having heard and considered the oral arguments of counsel at the hearing, and being fully advised in the premises,

IT IS ORDERED that:

1. The Motion of the Tribes for judgment notwithstanding the verdict is denied.

2. The Motion of the Tribes for a new trial with respect to liability and damages is granted, and the Judgment entered in the above-entitled matter against the defendant, Arapahoe and Shoshone Tribes is set aside, but the Judgment and Final Order entered with respect to all other defendants shall continue in full force and effect.

3. The Clerk's certification of costs is set aside pending retrial or other disposition of the case.

Dated this 18 day of February, 1978.

BY THE COURT:

/s/ Aldon J. Anderson
ALDON J. ANDERSON
District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C74-74A

[October 12, 1978]

DRY CREEK LODGE, INC., *et al.*,
Plaintiffs,

v.

JAMES CANAN, Area Director of Bureau of Indian Affairs, Billings, Montana, *et al.*,
Defendants.

ORDER

This cause, having come on before the Court on the defendant Shoshone and Arapahoe Tribes' motion to dismiss, and the Court having been fully advised, it is

ORDERED That this action is dismissed with prejudice as to the sole remaining defendants, the Shoshone and Arapahoe Tribes, for the reasons stated on the record by the Court at the hearing on September 11, 1978, and, specifically, because *Santa Clara Pueblo v. Martinez*, —— U.S. ——, 46 U.S.L.W. 4412 (decided May 15, 1978), squarely applies to this action, and it is

FURTHER ORDERED That costs shall be paid to defendants Shoshone and Arapahoe Tribes.

/s/ Aldon J. Anderson
ALDON J. ANDERSON
United States District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

No. C74-74A

[September 11, 1978]

DRY CREEK LODGE, INC., *et al.*

v.

JAMES CANAN, Area Director of Bureau of Indian Affairs, Billings, Wyoming, *et al.*

ORAL RULING ON TRIBES MOTION TO DISMISS
(Excerpt from Hearing Transcript)

THE COURT: Well, it's a case that has given all of us concern, I'm sure, to those who feel they have been wronged as to the Cooks and to those who were in support of them, the other plaintiffs. The result which is contended for is very difficult to understand. I would, in an effort to provide some clarification to those matters, a rationale of the decision, I would like to read a few statements from this Supreme Court decision. I am just picking out a few that I have noted.

First of all, Indian law is very complex and difficult even to lawyers and judges because it is, in effect, a system within a system. But, I am reading now from the beginning of Roman numeral two in the opinion, "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self government." That's important to remember.

Next, "As separate sovereigns preexisting the Constitution, tribes have historically been regarded as un-

constrained by those constitutional provisions framed specifically as limitations on federal or state authorities." Unconstrained by constitutional provisions.

"As the Court in Talton recognized, however, Congress has plenary authority to limit, modify or eliminate the powers of local self government which the tribes otherwise possess." So, the Cooks are not without any forum other than the Indian courts under the ruling of this case as contended for by the defendant tribes.

But Congress has plenary power with respect to the tribes.

Moving on, "In 25 U.S.C. 1302, Congress acted to modify the effect of Talton on its progeny by imposing certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment."

Now, that much we knew and understood as we tried Dry Creek. And this Court and the Tenth Circuit interpreted the Indian Civil Rights Act to justify the—an implied right of action in view of the setting of the statute and its seemed intended purposes.

But, the Supreme Court corrects the Tenth Circuit and myself in this respect. It says, "In 25 U.S.C. 1303, the only remedial provision expressly supplied by Congress, the 'privilege of the writ of habeas corpus' is made 'available to any person, in a court of the United States to test the legality of his detention by order of an Indian tribe'."

And in this case, the Santa Clara case the "petitioners had conceded that 1302 modified the substantive law applicable to the tribe. They argued, however, that Congress did not intend to authorize federal courts to review violations of its provisions except as they might arise on habeas corpus. They argued, further, that Congress did

not waive the tribe's sovereign immunity from suit. Respondents, on the other hand contend that 1302 not only modifies the substantive law applicable to the exercise of sovereign tribal powers, but also authorizes civil suits for equitable relief against the tribe and its officers in federal courts." And so, the issue is squarely before them. And without quoting too much I would like to pick out one or the other points of importance.

"Where Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will desert the other. Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with 1302"—those are the products of the Indian Civil Rights Act—"plainly would be at odds with the congressional goal of protecting tribal self government. Not only would it undermine the authority of tribal forums but, it would also impose serious financial burdens on already 'financially disadvantaged' tribes."

And then they quote from the subcommittee on constitutional rights, senate judiciary committee, constitutional rights of the American Indian, summary report of hearings and investigations held in Congress at the time this legislation was passed.

"Moreover, contrary to the reasoning of the court below, implementation of a federal remedy in addition to habeas corpus is not plainly required to give effect to Congress' objective of extending constitutional norms to tribal self government. Tribal forums are available to vindicate rights created by the Indian Civil Rights Act and 1302 has substantial and intended effect of changing the law which these forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusion of adjudication of disputes

affecting important personal and property interests of both Indians and non-Indians," in citing several cases.

They went on further to say that "non-judicial tribal institutions have also been recognized as competent law-abiding bodies. Under these circumstances, we are reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck in providing only for habeas corpus relief."

So, the nub of their holdings, "suits against the tribe under the Indian Civil Rights Act, are barred by the tribe's sovereign immunity from suit." Since nothing on the face of the Act purports to subject tribes to the jurisdiction of federal courts in civil actions for declaratory or injunctive relief.

Second, nor does Section 1302 impliedly authorize a private cause of action for declaratory and injunctive relief against the Pueblo's governor. Congress' failure to provide remedies other than habeas corpus for the enforcement of the Indian Civil Rights Act was deliberate as was manifest from the structure of the statutory scheme and legislative history. Congress was committed to the goal of tribal self determination. Section 1302 selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique needs of tribal government. Creation of a federal cause of action for the enforcement of 1302 rights would not comport with the approved congressional goal of protecting tribal self government.

Tribal courts which have repeatedly recognized as appropriate forums for adjudicating disputes involving important interests of both Indians and non-Indians are available to vindicate rights available by the Indian Civil Rights Act.

After considering numerous alternatives for review of numerous tribal convictions Congress apparently de-

cided that review by way of habeas would adequately protect the individual interests at stake while avoiding unnecessary intrusions on tribal government. Similarly, Congress considered and rejected proposal for federal review of alleged violations of the Indian Civil Rights Act arising in the civil context. It is thus clear that only the limited review mechanism of Section 1303 which is the habeas section, was contemplated. By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may also have considered that resolution of statutory issues under 1302 and particularly those issues likely to arise in a civil context will frequently depend upon questions of tribal tradition and customs that tribal forums may be in a better position to evaluate than federal courts."

It seems to me clear, Mr. Hursh, from those salient provisions in the opinion of the Supreme Court the Court has no choice. The counsel for the tribes has corrected the Court with respect to the difference between the ruling of the Court as it applied to the tribes and as it applied to the governor of the Pueblo, but, the portions that I have referred to seem to clearly, manifestly require this Court to grant the motion and to leave you to your right of appeal.

It is a matter about which there may be strong difference of opinion as to whether or not generally and certainly in particular situations there is sufficient adequacy to provide the fairness that non-Indians have come to expect in the courts which obtain in the state and federal courts. But, be that as it may the law of the land has been determined and for the purposes set forth the Supreme Court has determined that the Congress has so acted and Congress has plenary power in

these matters and their determination is binding and this Court recognizes it and so rules.

Thank you.

(Thereupon the proceedings continued but not transcribed herein.)

APPENDIX I

JULY TERM—July 18, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges

No. 78-1999

DRY CREEK LODGE, INC., a Wyoming corporation, its officers and directors; ALBERT C. COOK, ELIZABETH C. COOK, ALBERT C. COOK, as executor of the estate of Thomas C. Burlingham, deceased; BENJAMIN MILLER; ROBERT MILLER; and DAVID MILLER,

Plaintiffs-Appellants,

vs.

ARAPAHOE and SHOSHONE TRIBES,

Defendants-Appellees.

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing en banc filed in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of

Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX J

JULY TERM—July 22, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges

No. 78-1999

DRY CREEK LODGE, INC., a Wyoming corporation, its officers and directors; ALBERT C. COOK, ELIZABETH C. COOK, ALBERT C. COOK, as executor of the estate of Thomas C. Burlingham, deceased; BENJAMIN MILLER; ROBERT MILLER; and DAVID MILLER,

Plaintiffs-Appellants,

vs.

ARAPAHOE and SHOSHONE TRIBES,

Defendants-Appellees.

The Court, in order to correct a clerical error made in the Court's order dated July 18, 1980, in the captioned cause does hereby reissue said order nunc pro tunc to read in its entirety as follows:

"This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing en banc filed in the captioned case.

"Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted. Circuit Judge Holloway voted to grant rehearing by the panel.

"The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied."

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX K

Indian Civil Rights Act of 1968, 25 U.S.C. Sections 1301-1303.

§ 1301. Definitions

For purposes of this subchapter, the term—

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and

(3) "Indian court" means any Indian tribal court or court of Indian offense.

§ 1302. Constitutional rights

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peacefully to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its law or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

§ 1303. Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

Supreme Court, U. S.
FILED
DEC 6 1980
MICHAEL RODAK, JR., CLERK

No. 80-613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SHOSHONE and ARAPAHOE TRIBES,
Petitioners

v.

DRY CREEK LODGE, INC., *et al.*
Respondents

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is the Court of Appeals' Decision consistent with the provisions of the Treaty of 1868?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-613

SHOSHONE and ARAPAHOE TRIBES,
Petitioners

v.

DRY CREEK LODGE, INC., *et al.*
Respondents

OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Respondents, Dry Creek Lodge, Inc., Albert C. Cook; Elizabeth P. Cook; the Estate of Thomas C. Burlingham; Benjamin Miller; Bernice Miller; Robert Miller; and David Miller respectfully file their opposition to the Petitioners' Application for a Writ of Certiorari in this case. 1/

1/ During these proceedings, Thomas Burlingham died and Albert C. Cook as executor of his estate, has been substituted as a party herein.

STATEMENT OF THE CASE IN OPPOSITION

History of this Reservation

1. The Wind River Reservation was created by the Treaty of 1868. The original boundaries comprised about 2,300,000 acres.

2. Since the establishment of this Reservation, Congress has periodically opened up the Reservation until today substantial tracts of non-Indian land exist. There are now "many more non-Indians than Indians living within the boundaries". (Pet. App. A p. 2a)

3. In 1905, the Tribes ceded outright to the United States about one-half of their Reservation for homesteading. These lands were, by Act of Congress, opened up to public entry. Act of March 3, 1905, 33 *Stat.* 1016. In 1939, those lands which had not been sold were given back to the Tribes. 53 *Stat.* 1128. The Reservation has been substantially diminished.

4. As a result, now included within the original boundaries of the Reservation is the City of Riverton with a population of in excess of 12,000 people. Other non-Indian cities and towns exist within the "original" boundaries. (Pet. App. A). Some 6,000 Indians reside on the Reservation. About 42,000 non-Indians reside in Fremont County or near the Reservation. 2/

2/ *Stipulated Facts.* Civil No. C79-267, District of Wyoming, 1979. This Reservation, as it is now sturctured, very much resembles the one in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, where this Court observed, " . . .today, many reservations, including Port Madison Reservation, have extensive non-Indian populations. The percentage of non-Indian residents grew as a direct and intended result of congressional policies in the late 19th and early 20th centuries promoting the assimilation of the Indians into the non-Indian culture. Respondents point to no statute, in comparison to the Western Territory Bill, where Congress has intended to give Indian Tribes jurisdiction today over non-Indians residing within Reservations. (Fn. 13 – Opinion)

Background of this Case

This case comes before the Court in a unique posture. The contentions of the Respondents as original plaintiffs are not premised upon factual speculation. A jury has found, upon trial of the merits, that Respondents' civil rights were in fact violated by the actions of the Tribes and a verdict entered. 3/

The factual scenario here created by the petitioners was previously presented to a trial jury and rejected. The Respondents' proof as accepted by the jury and presented to the Court of Appeals develops into this picture: 4/

1. Dry Creek is a small ranch sitting on fee patented land within the original boundaries of the Wind River Reservation located in Central Wyoming. The patent issued by the United Stated and dated in 1924 was unrestricted as to the use of the land. No provision was expressly made in the patent for ingress and egress to this isolated tract of land.

2. There is a single road providing ingress and access to the ranch property. This road has been used as such for over eighty years by the various inhabitants of the tract of land, both Indian and non-Indian. No formal right-of-way or government easement has ever existed along this road for any landowner, Indian or non-Indian, and none has ever been required since the Treaty of 1868. Excepting for power lines, canals and secondary highways, few, if any, Bureau of Indian Affairs rights-of-way have been required or granted on this Reservation.

3/ The Petitioners' reliance upon Judge Kerr's original *Findings of Fact* (cited as "Tr. Inj.") is misplaced as these findings were set aside in the first appeal in this case at 515 F. 2d 926 as the result of a "summary trial" in violation of Rule 56, FRCP. At trial, the Tribes did not request any special findings by the jury.

4/ These representations of fact were not traversed by the Tribes when presented to the Court of Appeals. The Opinion below reports these operative facts. (See Pet. App. A).

3. Albert C. Cook and Elizabeth P. Cook purchased their property in 1965. They are non-Indians. In 1973, they conceived the idea of building a small guest ranch on their land designed to provide employment for their Indian ranch hands and to provide a place for their friends and guests to come and visit. The Cooks, at the outset, presented their plans to the Superintendent of the Reservation who approved them and encouraged the Cooks to proceed. The Cooks were advised by the Superintendent that they didn't need to obtain a formal right-of-way from the Bureau of Indian Affairs inasmuch as projects of this type provided for employment for Indians and there would be no problem with access along the road.

4. The Cooks then approached the Small Business Administration for a loan to build up the ranch. The Small Business Administration made Liaison with the Bureau of Indian Affairs and received the same assurances from the Superintendent concerning the proposed lodge business and right-of-way. A loan of $245,000.00 was approved.

5. The Federal Government subsequently issued a *Federal Trader's License* which specifically licensed and authorized the Cooks to build Dry Creek Lodge on their property and operate it as a guest ranch. 5/

6. The Bonatsie family are enrolled Indians of the Shoshone Tribe. In various percentages, they own minority and inheritance expectancy interests in a series of land allotments across which the access road must pass. At one section corner, the old road crosses an allotment in which the Bonatsie family owned a majority interest. 6/

5/ Throughout this protracted litigation, the Federal License has never been revoked or rescinded.

6/ The remainder of the interests were in various fractions of heirship among other Indian estates and not all members of the Bonatsie family. A majority of those other interest holders gave their consent to the project and use of the access road.

7. Construction was then commenced by the Cooks on their lodge. Contractors and workers, both Indian and non-Indian, used the road daily crossing the corner of the Bonatsie allotment without question or interference. Indian people helping build the lodge and who were to be employed there as guides established their homes on the ranch and moved their families in. No objection had been herd from anyone until the loan monies had been substantially expended and the grand opening of the lodge was imminent.

8. On May 18, 1974, many people were invited to the opening of this small lodge. It was upon this opportunity that the Bonatsie family approached the Tribal Council and demanded that this road be closed, the lodge be shut down, and the Cooks be driven from their private property and the Reservation. 7/ The Tribal Council passed an ordinance directing the government to close the road as a result of the Bonatsies' request.

9. The Bureau of Indian Affairs Superintendent was present at the Council meeting and acted in accordance with their wishes. Notwithstanding his earlier approval of the lodge and licensing of same, the Superintendent directed his agents to carry out the wishes of the Tribes and close the road with a barricade to maroon the occupants at the lodge. The barricade was maintained by force of arms. The Superintendent asked permission to call the United States Attorney for advice but was persuaded by the Tribal attorneys from Washington not to utilize the courts to affect the Tribes' goal. The Superintendent acquiesced and ordered his armed agents, along with Tribal police officers, to immediately close the ranch.

7/ **The Transcript of this proceeding is provided for the Court's scrutiny as Appendix B. The Court will readily see, as did the jury, that the intent of the Joint Business Council and the Tribes was to not only stop the use of this road, but to utilize this mechanism to drive the Cooks from the Reservation. This was done upon advice of counsel as is clearly shown in the Transcript.**

All of the people there, including women and children, were told they could not leave the ranch as that was the order of the Tribal Council. No legal process was obtained.

10. As a result, the Cooks and the Indian employees and little children trying to go to school were barricaded by force of arms in their 160 acres of land. Only by operation of law and process obtained by the Cooks in a peaceful manner from Judge Kerr and the issuance of the temporary restraining order was this road opened in an orderly manner.

11. The Appellant Dry Creek's initial request was for a temporary restraining order and equitable relief by way of injunction to keep the road open and get the children out to school with access maintained. The trial court initially dismissed this case for lack of Federal jurisdiction. The Tribes' argument made at that time was that there was a forum available with the Court of Indian Offenses.

12. The Tribal Judge, Lawrence Miller, was approached to take jurisdiction of the matter in order to keep the peace and determine the access issue created by the armed barricade. The Tribal Judge indicated an initial willingness to attempt a hearing if the Tribes would consent to his jurisdiction as required by the Federal Regulations. 8/ No consent was given. Judge Miller later advised that he feared his job would be lost if he heard a case involving the Tribal Council. 9/ The Tribal forum, if there was one, was denied.

13. With the attempt to use both the Federal and Tribal

8/ This Reservation has what is known as a Court of Indian Offenses which operates under 25 C.F.R. 11.22 et seq. A suit against the Tribes can only be entertained by stipulation.

9/ An attempt was later made by the Tribal Council to have Judge Miller fired because he even considered taking jurisdiction of this matter.

Courts thwarted, the Appellants, Dry Creek, then requested the State Court to take jurisdiction of the matter. These State actions were met with writs of prohibition, motions to dismiss and removed to the Federal Court where they were in fact dismissed for lack of jurisdiction.

14. The Court of Appeals, in its first decision, directed a Federal forum on the constitutional issue. 515 F. 2d 926 (10th Cir. 1975).

15. A jury trial on the merits was finally held in May of 1977 and lasted almost a month. The jury, upon the entire evidence prepared and presented, returned a verdict on the merits in favor of the plaintiffs.

16. The Trial Judge instructed the jury, as a matter of law, that the Respondents had a right to use the road. (Transcript of Jury Trial Instruction, May 21, 1977, C74-74A).

17. During the past trial proceedings, this Court decided *Santa Clara v. Martinez,* 436 U.S. 49 (1978). Upon motion of the Tribes, the District Court then dismissed the case for lack of Federal jurisdiction. The Court of Appeals reversed and it is from this decision that Petitioners' request that Certiorari be granted. The Respondents respectfully oppose.

ARGUMENT

The Decision of the Court of Appeals is Consistent With The Treaty of 1868 Which Provides for Recourse When Deprivations Are Committed.

1. A basic principal long recognized by this Court is that all aspects of Tribal sovereignty including common-law immunity from suit is subject to the superior and plenary control of Congress. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1980). **Congress may limit Tribal Sovereignty by exercise of its commerce clause powers and/or treaty-making powers.** *Worcester v. Georgia,* 31 U.S. 350, 368 (1832); see also *F. Cohen Handbook of Federal Indian Law* 122 (University of New Mexico Edition). (emphasis supplied).

2. The Court of Appeals sustains a cause of action against the Tribes in a Federal forum to consider a claim for a constitutional depredation committed by the Indian Tribes. The depredation is founded in the restraint of liberty without process and denial of equal protection of the law. The *Indian Civil Rights Act*, 25 U.S.C. 1302(8), places the burden of any such deprivation upon the shoulders of the Tribal government. As pertains to this Reservation, Congress has simply restated an underlying provision of the Treaty of 1868. The Tenth Circuit Opinion recognizes and gives effect to the same provision. In cases such as this, the Treaty expressly directs a damage remedy against the Tribes: Article I paragraph 3 reads:

> "If bad men among the Indians shall commit a wrong or **depredation** upon the person or property of any one white, black, or Indian, subject to the authority of the United States, and at peace therewith, **the Indians herein** solemnly **agree** that they will, on proof made to their agent and notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to the laws; and in case they wilfully refuse so to do, **the person injured shall be re-imbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States.** And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating or because of his violating the provisions of this treaty or the laws of the United States shall be reimbursed therefor."
>
> (Treaty of 1868) 15 *Stat.* 673 (emphasis supplied). Treaty is attached as Appendix A.

3. This Treaty was ratified by the Congress in 1869. A Federal remedy is specifically provided. Any Tribal immunity is expressly waived. The Court of Appeals' decision to afford a Federal forum in a constitutional case to deter-

mine the merits of a civil rights claim and the measure of damages is not only a proper result but one mandated by the terms of the Treaty itself. *(Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed 2d 619 (1971); *Bell v. Hood*, 327 U.S. 678, 66 S. Ct. 773, 90 L.Ed 939 (1946). In the *Indian Civil Rights Act*, 25 U.S.C. 1302(8), Congress and this Court have restated the pre-existing guarantees of the Treaty. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). 10/ If the Tribes and any Tribal member commit a depredation of the rights of another, the Tribe is liable for any damage caused and must compensate the injured party for his damage. The Treaty so provides. The Tribal immunity is expressly waived. Such was not the case in *Santa Clara*.

4. The facts of this case show no Tribal or State forum. The unavailability of the Tribal Court was a cornerstone of *Santa Clara*. There is no Tribal Court Jurisdiction in a *Court of Indian Offenses* on this Reservation over the Tribes. 11/ 25 C.F.R. *Indians* § 11.22. The State actions were removed and then dismissed. The Court of Appeals sustained a Federal forum in a case involving invasion of a civil right, i.e. personal liberty. Such a philosophy is consistent with *Oliphant*, supra, where the fundamental proposition is stated:

> "But, from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested in equally great solicitude that its citizens be protected by the United States from unwarranted intrusions upon the personal liberty." *Oliphant v. Suquamish Indian Tribes*, 435 U.S. 191 (1978).

10/ The Tribes' counsel, in the Trial Court, submitted that there is no Tribal forum here.

11/ The Treaty likewise allows Indians to assert claims for damage for depredations by non-Indians. It would be interesting to know how many claims the Tribes have filed over the years asserting this type of provision.

5. In the instant case, the jury found that the actions of individual Indians and the Tribes were a violation of the Constitution and laws of the United States. Therefore, under the provisions of the Treaty of 1868, the injured people (i.e. Cooks) were entitled to be reimbursed for their losses. The Tenth Circuit's Decision does precisely that and nothing more. The Circuit is correct and consistent.

6. Petitioners' suggestion that the Court of Appeals' decision is an infringement upon Congress' authority to define Tribal immunity is in error. To the contrary, the Petitioners now ask this Court to infringe on that congressional authority. Congress has not passed any laws which indicate any intention whatsoever of changing the Treaty of 1868.

7. The Petitioners rely on *Santa Clara*, supra, to escape accountability for their conduct. The Court of Appeals limited *Santa Clara* to internal Tribal affairs. There was no express remedy in *Santa Clara* providing damages against the Tribe or waiving Tribal sovereign immunity. Here, the Treaty of 1868 controls and expressly denotes a damage remedy to be paid by the Tribes for deprivations. The jury found a deprivation of Civil Rights and *Santa Clara* does not apply to these facts.

CONCLUSION

This case does not require this Court to reopen the issue of whether or not the *Indian Civil Rights Act* constitutes a waiver of Tribal immunity and allows a damage remedy. Here, the Treaty of 1868 expressly creates a substantive right and a remedy against the Tribes and expressly provides for damages to be paid by the Tribes. The Court of Appeals' decision is consistent with the Treaty and subsequent laws and should be sustained.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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October 1980

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 1980, I served the foregoing OPPOSITION TO PETITION FOR WRIT OF CERTIORARI by mailing three copies, first-class postage prepaid, to each of the following:

Harry R. Sachse, Esquire
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John R. Hursh
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Riverton, Wyoming 82501
Attorney for Dry Creek Lodge, et al.

Appendices

TREATY WITH THE EASTERN SHOSHONI AND BANNOCK, 1868

July 3, 1868.
15 Stat. 673.
Ratified Feb. 26, 1869.
Proclaimed Feb. 24, 1869.

Articles of a treaty made and concluded at Fort Bridger, Utah Territory, on the third day of July, in the year of our Lord one thousand eight hundred and sixty-eight, by and between the undersigned commissioners on the part of the United States, and the undersigned chiefs and head-men of and representing the Shoshonee (eastern band) and Bannack tribes of Indians, they being duly authorized to act in the premises:

Peace and friendship.

ARTICLE 1. From this day forward peace between the parties to this treaty shall forever continue. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it.

Offenders among the whites to be arrested and punished

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States, will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs, at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also re-imburse the injured person for the loss sustained.

Among the Indians to be given up to the United States, etc.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to the laws; and in case they wilfully refuse so to do, the person injured shall be re-imbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the

Rules for ascertaining damages.

President, on advising with the Commissioner of Indian Affairs shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating or because of his violating the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

Reservation.

ARTICLE 2. It is agreed that whenever the Bannacks desire a reservation to be set apart for their use, or whenever the President of the United States shall deem it advisable for them to be put upon a reservation, he shall cause a suitable one to be selected for them in their present country, which shall embrace reasonable portions of the "Port Neuf" and "Kansas Prairie" countries, and that, when this reservation is declared, the United States will secure to the Bannacks the same rights and privileges therein, and make the same and like expenditures therein for their benefit, except the agency-house and residence of agent, in proportion to their numbers, as herein provided for the Shoshonee reservation. The United States further agrees that the following district of country, to wit: Commencing at the mouth of Owl Creek and running due south to the crest of the divide between the Sweetwater and Papo Agie Rivers; thence along the crest of said divide and the summit of Wind River Mountains to the longitude of North Fork of Wind River; thence due north to mouth of said North Fork and up its channel to a point twenty miles above its mouth; thence in a straight line to head-waters of Owl Creek and along middle of channel of Owl Creek to place of beginning, shall be and the same is set apart for the absolute and undisturbed use and occupation of the Sho-

Boundaries.

shonee Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.

Who not to reside thereon.

Buildings to be erected by the United States.

ARTICLE 3. The United States agrees, at its own proper expense, to construct at a suitable point of the Shoshonee reservation a warehouse or store-room for the use of the agent in storing goods belonging to the Indians, to cost not exceeding two thousand dollars; an agency building for the residence of the agent, to cost not exceeding three thousand; a residence for the physician, to cost not more than two thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a school-house or mission building so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding twenty-five hundred dollars.

Mills.

The United States agrees further to cause to be erected on said Shoshonee reservation, near the other buildings herein authorized, a good steam circular-saw mill, with a grist-mill and shingle-machine attached, the same

to cost not more than eight thousand dollars.

Reservation to be permanent home of Indians.

ARTICLE 4. The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.

Agent to make his home and reside where.

ARTICLE 5. The United States agrees that the agent for said Indians shall in the future make his home at the agency building on the Shoshonee reservation, but shall direct and supervise affairs on the Bannack reservation; and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

Heads of families desiring to commence farming may select lands, etc.

ARTICLE 6. If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within the reservation of his tribe, not exceeding three hundred and twenty acres in extent, which tract so selected, certified, and recorded in the "land-book," as herein directed, shall cease to be held in common, but the same may be oc-

Effect of such selection.

cupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Persons not heads of families.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above described. For each tract of land so selected a certificate, containing a description thereof, and the name of the person selecting it, with a certificate indorsed thereon that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office subject to inspection, which said book shall be known as the "Shoshone (eastern band) and Bannack land-book."

Certificates of selection to be delivered, etc., to be recorded.

Survey.

The President may at any time order a survey of these reservations, and when so surveyed Congress shall provide for protecting the rights of the Indian settlers in these improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations, and the internal police thereof, as may be thought proper.

Alienation and descent of property.

Children between 6 and 16 to attend school.

ARTICLE 7. In order to insure the civilization of the tribes entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent

Duty of agent.

for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for twenty years.

Schoolhouses and teachers.

Seeds and agricultural implements.

ARTICLE 8. When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seeds and implements as aforesiad in value twenty-five dollars per annum.

Instructions in farming.

And it is further stipulated that such persons as commence farming shall receive instructions from the farmers herein provided for, and whenever more than one hundred persons on either reservation shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be required.

Second blacksmith.

Delivery of articles in lieu of money and annuities.

ARTICLE 9. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any and all treaties heretofore made with them, the United States agrees to deliver at the agency-house on the reservation herein provided for, on the first day of September of each year, for thirty years, the following articles, to wit:

Clothing, etc.

For each male person over fourteen years of age, a suit of good substantial woollen

clothing, consisting of coat, hat, pantaloons, flannel shirt, and a pair of woollen socks; for each female over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woollen hose, twelve yards of calico; and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woollen hose for each.

Census.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based; and in addition to the clothing herein named, the sum of ten dollars shall be annually appropriated for each Indian roaming and twenty dollars for each Indian engaged in agriculture, for a period of ten years, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians

May be changed.

may indicate to be proper. And if at any time within the ten years it shall appear that the amount of money needed for clothing under this article can be appropriated to better uses for the tribes herein named, Congress may by law change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President shall annually detail an officer of the Army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

Army officer to attest delivery of goods, etc.

Physician, teachers, carpenter, etc.

ARTICLE 10. The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engi-

neer, farmer, and blacksmith, as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

Cession of reservation not to be valid unless, etc.

ARTICLE 11. No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive without his consent, any individual member of the of the tribe of his right to any tract of land selected by him, as provided in Article 6 of this treaty.

Presents for most valuable crops.

ARTICLE 12. It is agreed that the sum of five hundred dollars annually, for three years from the date when they commence to cultivate a farm, shall be expended in presents to the ten persons of said tribe who, in the judgment of the agent, may grow the most valuable crops for the respective year.

ARTICLE 13. It is further agreed that until such time as the agency-buildings are established on the Shoshonee reservation, their agent shall reside at Fort Bridger, U.T., and their annuities shall be delivered to them at the same place in June of each year.

JOINT BUSINESS COUNCIL

May 18, 1974

Chairman. . . . . Jesse Miller
Secretary. . . . . Barbara Roberts

(Chairman: I'll read these letters we have from Legal Services to the Joint Business Council:

"May 6th

Reference: Ben Miller's Guide Application

Dear Sirs:

I have sent a letter requesting a meeting with the Fish and Game Committee, Shoshone and Arapahoe Tribes. I am doing so for several reasons, primarily, however, because of the apparent refusal of that committee to meet with Mr. Miller and myself and discuss the failure of that committee to give approval of the license, and the failure of the Council to intercede and require that meeting to be held.

If a meeting and hearing is not held at which Mr. Miller, myself, and all interested parties may appear, then in order to protect Mr. Miller's rights as an enrolled member of the Arapahoe Tribe, legal action may very well ensue.

And this is another one:

Marvin Sonosky: Who signed it?)*

*Note: All material within parentheses was deleted from provided transcript.

(Chairman: Denhardt. Robert B. Denhardt. Another one from Mr. Denhardt. They're both dated the same day. It says:

"Dear Sir:

I have twice requested that Ben Miller and myself appear before the Fish and Game Committee concerning the committee's failure to act on Mr. Miller's Guide License Application and today's action by the Committee has caused this letter to issue; i.e. the failure of the Committee to meet with us even though we have been on the agenda.

If we are not afforded an oportunity for hearing before you on or before the 22nd day of May, 1974, then apparently you will leave us with no alternative but to institute legal action in order to cause you to meet with us.

Robert B. Denhardt."

We met with Al Cook here on, uh, the 17th day of April in regards to this. And to me his contract with Mr. Ben Miller is probably legal and binding as far as they are concerned, but to me, I don't think it's binding as far as the Arapahoe and Shoshone Council because they have not, as far as I am concerned, proved that the outfit belongs to Ben Miller.

Marvin Sonosky: May I ask what the contract was? What did the contract provide? Do you have a copy?

? No)*

*Note: All material within parentheses was deleted from provided transcript.

(Alfred Ward (?) Mr. Chairman....He said he would have it here. He has the contract. (indiscernible)

Chairman: Denhardt said that?

Alfred Ward: (?) No, Mr. Underwood.

Clyde Hobbs: (?) Underwood's sick.

Chairman: Keep, do you have a copy of that letter?

Archie Keep: No, I don't have a copy of it. Mr. Chairman, I think I told Vince to try to have that, all of that material here so we could, you know, look into it. I think the contract is in the file over there...in regards to this.

Marvin Sonosky: Do you know what the contract provides?

Chairman: Yes. It provides Ben Miller with the equipment and stuff to operate an outfitter....

Marvin Sonosky: I mean what does Cook give Ben Miller?

Chairman: 400 a month.

Marvin Sonosky: And Ben Miller is supposed to provide all the, uh, equipment?

Chairman: That's right.

Marvin Sonosky: And, uh, and, uh, and he's working for Cook at 400 a month. He's providing all the...the investment for the equimpent and all that.

Chairman: This is what it's supposed to be.

Marvin Sonosky: Horses....)*

*Note: All material within parentheses was deleted from provided transcript.

(Chairman: Horses, pack outfits and so forth...

Marvin Sonosky: What would be the capital investment that you estimate?

Chairman: This I don't...in my estimation?

Marvin Sonosky: Yeah. How much would it take?

Chairman: Oh, it'd be....8 to at least $10,000.

Marvin Sonosky: Would you think it's a subterfuge; that it's Cook's money and that a, and that they're using Mr. Miller because he's a member of the tribe as a front to get the permit?

Alfred Ward: (?) Definitely...

Marvin Sonosky: My question is....

Alfred Ward: Definitely.)*

(OFF THE RECORD)

Ralphaelita Stump: And so when this happened, well, he asked me then, he said what's what's all the fuss up here. Well, I said there's no fuss. I said we just came up here to post our signs. And when we were on our way home, I said, the officers were here, stopped us and I said then this blockage of the, of the bridge. Well, when this happened, well, it seemed to me, was the attitude of everybody there, that we, the landowners, were the people that were in the wrong.

Alfred McAdams: Mr. Chairman.

*Note: All material within parentheses was deleted from provided transcript.

Chairman: Mr. McAdams.

Alfred McAdams: I'd like to ask Mr. Hobbs and Mr. Keep, yesterday morning we had a meeting and I informed Mr. Hobbs to instruct Mr. Keep to go up there and advise the family here, the Bonatsie family, of their rights. And did he do this?

Ralphaelita Stump: I didn't hear that.

Alfred McAdams: Did Mr. Keep advise of your rights and, and your protection of.

Ralpahelita Stump: No.

Alfred McAdams: land there.

Ralphaelita Stump: No. Anyway when before we backed up, this little incident happened in which kind of bothered me. And I'm not a very petty person, at least I don't think I am. And we backed up and my brother, the boy there, which is Wayland Bonatsie, and Officer Ruleau were standing in the road and when Archie Keep backed up, I leaned over and I said, "Boys, move your piggies out of the way or he'll run over them." He said, "Watch the language." He said, "Don't be calling people pigs." I didn't say pigs, I said, "Move your piggies." If anybody knows what piggies are, they're your feet. And that was the thing that kind of set in the wrong with me, I don't go around calling people names. And in the meantime when we got to talking, this Heineman, my immediate family, and this Miller boy were walking around outside. They didn't know what was going on and I told Mr. Keep then that we weren't there to cause any trouble whatsoever, we were just there

Ralphaelita Stump: posting our signs, minding our own business, and we were going home. But I said if you intend to keep us here I said, "We don't object because we don't live very far from here," I said, "We could stay all night if that's the case", so after he got to talking we got to visiting and we got to more or less kind of shooting the bull. And then he, Archie Keep, changed his, his attitude and he said, "Well," he said, "Are you people going to let these dining people that's going up here to dine through?" I said, "Well, I can't give you that answer," I said, "It's up to my family to decide. Beings that they're all landowners." So they talked it over among themselves and they said well under protest because there was no sign whatsoever that the law was there to protect our rights. It seemed to me and everybody else there that the protection was for the, Mr. Cook, Mr. Heineman, and the young Miller boy.

Marvin Sonosky: The Federal police officer suggested to you that: "Are you going to let these people through?"

Ralphaelita Stump: Yes, this is what he said..

Marvin Sonosky: He didn't suggest to them that this was private property?

Ralphaelita Stump: No.

Marvin Sonosky: And they had no business.

Helena Bonatsie: And he only took our names down.

Ralphaelita Stump: And on a piece of white tablet paper we all signed our names and on the bottom of that he wrote the attending officer's names and I was sitting in the car next to him in

Ralphaelita Stump: the seat when he did this. And if there's any paper stating that we signed anything for right-of-way or any other thing, it's completely out of order because we did not sign it. Those, that was only for protest and he said, Mr. Keep, said that he would testify to this if necessary.

Chairman: You were protesting?

Ralphaelita Stump: Yes.

Joe Engavo: Mr. Chairman.

Chairman: Mr. Engavo.

Joe Engavo: Yesterday in our Fish and Game meeting, well, just before it started, Helena called and told me what they intended to do. And this is to go up and post signs and, and block the right-of-way to the roads that's going up there and I told her to go ahead and do whatever she felt necessary, you know. And so I think the Fish and Game Committee that was here could also verify me telling Mr. Hobbs that he should do something about it, to go up there and protect, watch what happens, to protect the Indian people. And I, I, one of the remarks I made is that I suppose if anything happens, the Indian person would get cau, prosecuted for.

Clyde Hobbs: Mr. Chairman.

Chairman: Mr. Hobbs.

Clyde Hobbs: Might go on this a little bit and maybe Mr. Keep will, you know, say a little what he saw and what happened to. So we could get a little more broader picture but I had told Keep, you know, to send someone, you

Clyde Hobbs: know, to check this out. And before he left I got a call from Judge Miller and he said there might be a lot of trouble up there tonight and they ought to have a policeman up there. And he said I intend to issue a restraining order, have a restraining order issued on a paper so they won't interfere. And I said Judge, you're involved in this, I don't know how you can issue a restraining order when it's your own boy that's involved in it. And he said well, I'll see Judge Enos, Frank Enos, see if he'll do this. I then, I asked Keep to go down and talk to Lawrence Miller, the Judge, and also if Enos was there to explain, to Enos what was going on in case he you know, he may not have known what was going on. Enos called me later asking about this and I talked to him a little bit but he said that he had already been to the court and back. He didn't say whether he seen Archie or not but he said, "I wouldn't sign that." And I said, well, I think I'm relieved that you didn't because I don't think that it goes, it's, it's a sort of a thing that the Court of Indian offenses Judge can settle anyway. But then Archie did talk to me about what happened there and I think maybe if we could hear from Mr. Keep a little bit, Mr. Chairman, it might cover some of the things that happened, not only down at the Court but what his purpose was in going up to the Dry Creek Crossing, whether trespassing on these allotments.

Chairman: Keep, you care to say anything?

Archie Keep: Mr. Chairman. I don't know what happened at Court yesterday, I know that Mr. Denhardt was with Ben Miller and Mr. Cook. They was preparing an injunction or something of the sort. I never did find out

Archie Keep: the full facts of what it was. I know Mr. Enos didn't sign it. Last night I received a call from Mr. Cook about 6:30 that he figured there was going to be a bunch of trouble up there. Mr., Officer Ruleau was up there, he went ahead of me. My car ain't run so fast. And after I arrived there I contacted these people there. I always like to speak to the leader of the group before I get too involved. Like Mrs. Stump said, was a little petty thing, you know, this piggy business. But it did sound to me like pigs and I understand, you know, what little piggies are now, they're toes. We did talk about this, they was I believe, all the guests that were going up to Mr. Cook's had already been through except one and I'm not too sure about that. As there was some ranchers around there. She, there was no big noise or anything like this. They didn't raise their voice. There was no, they was objecting to these people going through. We was on Mr. Maytag's land I believe. There was a truck on the road I didn't understand, it was blocking traffic it could have been. They did move it when I came. Got it out of the way. They did register protest. I probably could have wrote all their names down that was there, but then instead of it....

Secretary's Note: (Changed tapes).

The Brown, I don't know what his name is, Mr. Ben Miller, and there was some fellow who was pretty well dressed came up and drove on. I don't know who he was. The road wasn't chained. I didn't observe the signs that they put up but Mrs. Stump said they was putting signs up.

Robert Harris, Sr.: Mr. Chairman, off the floor.

Chairman: Mr. Harris

Robert Harris, Sr.: My understanding of Mr. Keep went out on call from Mr. Cook, is that right?

Archie Keep: That's correct.

Robert Harris, Sr.: Statement.

Archie Keep: No.

Robert Harris, Sr.: Mr. Hobbs, when I left your office about three o'clock when you were going to find Keep, you never instructed him to go up. I understood then that you was going to go look for Keep. And I mentioned it to you then, if you recall, about what the duty of the police officers when they went up there were. And then you agreed to it.

Clyde Hobbs: Yes, I did. And I told Keep to send policemen up there and he said that's when he sent Ruleau up, you know, to, you know, to call them back if he needed other policemen, you know, that's why Ruleau was on his way up there, Ruleau was on his way. On his own I suppose and you sent Ruleau ahead, you know,

Archie Keep: Ruleau was gone.

Clyde Hobbs: and I told Judge Miller, you know, when he said that, you know, that they were going to put a restraining order, I told him that the police would be there for the purpose of seeing that that, if there was a chain across that road, that it not be removed. If the policemen would go over there and see that it was not removed. Now we couldn't have done that against the court order but there was no court order, you know, and that was the purpose of, of the policemen

Clyde Hobbs: being there is to see that, that they block that road that they be there to, to protect their rights. Now, I think it's well worth talking about this, you know, I'm now, I'm not saying that we did anything perfect but I think that we need to talk out what we were. One of the things that we were trying to do or I was trying to do and I, and I think the policeman's carrying out what I wanted, was to identify the, the intent of the feeling, you know, on this thing. Now the Bonatsies told me all along that they didn't want this through there but that the intent of that feeling was, did they chain that gate, you know, and say that you would not come through. And they restrained themselves from doing this. I think they had the right, you know, to chain the gate up. I told them that they had the right. And I told Judge Miller that they had the right. Whether I'm right or wrong I don't know, you know, Mr. Sonosky could go back to something else that we don't know what the Superintendent has but we had the right to go over and confiscate the alcohol, you know, at Mazurie's. Judge Kerr said I was right, you know, the regulations said I was to do that. Judge Kerr said the regulations would stand and that the Superintendent was right. The tenth circuit court said I was not right, you know. I mean this is what, you know, we don't know what the Courts would finally say but what we have today is that we protect the interest of those people that are being trespassed upon. At least I still do that.

Alfred Ward: Mr. Chairman.

Chairman: Mr. Ward.

Alfred Ward: It was there, what I can't quite understand

Alfred Ward: who told the trespassing public that they had no right on these people's land.

Ralphaelita Stump: Nobody told them that.

Alfred Ward: I mean, where would, where does this come in. I thought this would be the purpose of Law and Order being in this area was to inform the trespassing public that they had no right there. I recall that the Shoshone Business Council called in Mr. Hobbs a month ago or something like this, I don't remember the exact date and asked him that we were very concerned because we had members of the Shoshone Tribe that were being harassed in the Crowheart area, after we talked to Miss Helena Bonatsie. And Mr. Hobbs informed us at that time, that he would take every step possible to protect the tribal, these people in their rights. And I really don't believe this has been done.

Marvin Sonosky: I've been listening to all that stuff. The way it strikes me is that if I have a responsibility to the Indian people. And the Indian owners tell me that they don't want anybody across their land. And I say to them well chain it and then they didn't chain it so I don't have to do anything. How of, they may be afraid to chain it because they, if they chain it they could have invited trouble and they weren't getting any cooperative protection. But I think what the point that Alfred is making is that if that's true. And if you knew all of this. And these people advertise in the paper they're going to open up this Inn and everybody is invited to come. And you know that they got to go across their land of these people to get there. Then when he says to notify the public at least it could have been done is

Marvin Sonosky: call Mr. Cook and tell Mr. Cook now you are not going to cross over allotments. That's trust property and those people don't want you. And if you try to go across my police will be there to prevent it. So long as the allotment owners do not want that trespass. But that's not what happens, the saloon keeper calls up and says you better have your police down here, there's going to be trouble. And the police come on the scene prepared to quash the trouble that is being caused by the Indians, take down the names of all the Indians, whitemen, some of them doesn't even know their names, doesn't require them to sign a piece of paper. I, I can visualize that scene. I don't call that protecting the trust interest.

Helena Bonatsie: Mr. Chairman.

Chariman: Mrs.

Helena Bonatsie: I definitely called the police department in the morning. They did not respond to my call but they did to Mr. Cook.

Marvin Sonosky: Right, right.

Alfred McAdams: Mr. Chairman. I would like to ask Mr. Sonosky. There is a law and it's the Tribes have the right, have the power to prohibit the surge of off the reservation activity, activities by its members. And this law was passed in 1940, August 4, 1971 and June 30. There may have been an amendment to it in 1971. Are you familiar with it?

Marvin Sonosky: Law that prevents off reservation activities?

Alfred McAdams: Activities, yeh.

Marvin Sonosky: Off reservation?

Glen Wilkinson: I'm not familiar with it.

Marvin Sonosky: I want to add one more thing because I've had experience, experience on other reservations. When this sort of incident happens and it goes unattended, you are inviting trouble. I'm talking about AIM. Now one of the reasons AIM is a success on reservations and they have some successful chapters is because they get something done. When we have an incident happen on the reservation we have on the where, where in the saloon on a reservation they took an Indian man and woman, woman and, and, and took their clothes down and try to force sexual intercourse. A thing like that, nobody does anything, everybody sits and looks at it, now, AIM doesn't operate that way. Well, they march in a couple of hundred of them and they destroy the place. You invite that sort of thing when, when the governing body itself, and the Agency, doesn't take care of what has to be done. And believe me those police on those reservations where AIM is busy, don't like it. On one reservation there's a federal officer who has said to have a contract out on him and no other reservation wants him because they're afraid that if he comes the contract will follow. And he lives a life of jeopardy. Out here you've been able up to now to take care of yourselves. But this sort of thing can frustrate people when you see the saloon keeper getting all the attention and the protection. So that he can have his Grand Opening while the Indian allottees sit by and they get nothing, it's disgusting.

Alfred Ward: Mr. Chairman.

Chairman: Mr. Ward.

Alfred Ward: I believe that the Joint Business Council should support any action that is necessary to require that the Bureau of Indian Affairs under the trust responsibility and get the Tribal attorneys involved and make sure that these people's rights are protected. I can't see any other way to go with it.

Marvin Sonosky: There, there's several ways it can be done, but I, we could bring a suit, we could bring the suit now, to, to enjoin the use of that road on behalf of these people not in the Tribes' name. We could bring a suit to, to endeavor to close him down because he's going to get closed down in my opinion. There's no question about what the Supreme Court's going to do when they didn't take that case to affirm it. Whether that would be an appropriate thing to do now. But I don't see why the Tribe has to be put to that kind of expense. Is to have the lawyers go in and bring civil suit which will cost the Tribe money. When all the power sits right in the hands of the Agency. Federal statutes, regulations, and the money and the authority is there.

Alfred Ward: Well, I think we should.

Marvin Sonosky: All you got to have is somebody who's willing to perform his duty I just don't think it's that the Tribes should have to ask the attorneys and pay that kind of money.

Alfred Ward: Well, true, definitely, I agree with this but there's got to be force put on the Bureau, excuse me.

Robert Harris, Sr.: Mr. Chairman. I, I agree that there should be action taken, but not just a motion and forget about it.

Alfred Ward: That's true.

Robert Harris, Sr.: As I understand it, April 8, you had a memorandum from the attorneys posing some questions in setting up this. What carry up is made of this recommendum, or this memorandum?

Chairman: What does this pertain to? I don't recall it.

Marvin Sonosky: Same thing.

Glen Wilikinson: Same thing.

Robert Harris, Sr.: The very same thing, April the 8th. I want to know what carry-up was made, what follow-up was made of that memorandum. There's a copy to the secretaries, copy to

Marvin Sonosky: A copy to the Superintendent, Hobbs.

Clyde Hobbs: No.

Robert Harris, Sr: A copy to the Superintendent and a copy to the Area Office.

Clyde Hobbs: You mean on this right-of-way for Cook?

Robert Harris, Sr.: Yes.

Glen Wilkinson: Bonatsie land.

Alfred Ward: Yeah.

Robert Harris, Sr.: This is a Memorandum No. 40-74. It's dated April the 8th, 1974. It's to the Shoshone Business Council from Marvin J. Sonosky, General Council Subject: Right-of-way to Dry Creek Lodge.

Robert Harris, Sr.: ("Following my conversation with Chr. McAdams, I received the secretary's letter of March the 20th, 1974, send along a copy of the letter dated March the 13th, 1974 from Attorney Hursh regarding the individual Indians. Does Mr. Cook require this right-of-way order to reach a place where he intends to operate a liquor establishment without a tribal license? If so, I certainly recommend that no co-operation be offered his efforts. The individual Indians should refuse to grant a right-of-way. There is no basis on which Mr. Cook can force them)* to grant a right-of-way. I am also interested in the nature of the proceeding in the Tribal Court referred to in Attorney Hursh's letter of March 13, 1974. What motivated the Tribal Court to set down such a proceeding and issue notice? What is there in our Tribal Court which authorizes such action?

Respectfully submitted,

Marvin J. Sonosky"

Dated April 8th. A copy to each member of the Shoshone Business Council. A copy to Miss Barbara Roberts, Tribal Secretary. A copy to Clyde Hobbs, Supt., and a copy to James F. Canan, Area Director. I want to know what follow-up was made on it. You're talking about resolutions, you're talking about helping. What have you did on this matter?

Alfred McAdams: I mentioned this to Mr. Hobbs and he was going to reply to this question.

*Note: All material within parentheses was deleted from provided transcript.

Marvin Sonosky: Was that a proceeding before Judge Miller?

Clyde Hobbs: It was not a proceeding but it was intended to be a proceeding.

Marvin Sonosky: This outside attorney got the Judge to issue an order citing these people to come to Court.

Clyde Hobbs: He asked the Judge to do that, you know, and as I read that memorandum, and I did see it. In times because, about that time that this letter went out, you know, Lawrence Miller called me and he said that there's going to be a meeting at Al Cook's. Dry Creek Lodge, I should say. And that he was thinking about issuing an order for all those involved to be present at that meeting. And I said. well, what case do you have in front of you that gives you the authority to issue this kind of an order? And he said, I don't have any case and he said I'm glad I talked to you about this. And there were no orders issued but that letter did imply that there was going to be an order issued and there was an intent for on the part of, Al Cook and his attorney to get Judge Miller to issue such an order. He never did issue it.

Archie Keep: The lawyer wrote the letter but the Judge never issued it.

Clyde Hobbs: That's right. That doesn't resolve all the rest of the things but that one did not materialize.

Archie Keep: The lawyer didn't. he never did issue the order, that I know of.

Alfred Ward: Mr. Chairman.

Chairman: Mr. Ward.

Alfred Ward: I would like to make one comment that this question that, what did the Shoshone Business Council do in reference to this memorandum. I don't think we made proper follow-up because we referred, kept referring to the Bureau of Indian Affairs and their trust responsibility and we never properly followed it up because we felt that Mr. Hobbs under his obligation to these enrolled members of the Shoshone Tribe would carry out his obligation and I guess that would be our neglect for not following it because we did ask what he was doing.

Ralphaelita Stump: Mr. Chairman.

Chairman: Mrs. Stump.

Ralphaelita Stump: I have one question, one question that I'd like answered here due to the fact that there is a couple of attorneys here present, and my question is this. When Mr. Cook employs some Tribal members, his intention is to use these Tribal members to make us do what he wants us to do. And I think that if I employed the whole Reservation, I wouldn't expect a thing from the Reservation in return for my employing these people and I don't think that it's our business or our right-or what have you to give Mr. Cook a right-of-way through there just because there's some enrolled members working for him.

Chairman: I think this is what I told Mr. Cook on April the 17th.

Ralphaelita Stump: Well, this is the lever he's been using. And he sent my own cousin down to ask for a right-of-way for him, at my home.

Chairman: This was brought out and then he denied it.

Joe Engavo: Mr. Chairman.

Chairman: Mr. Engavo.

Joe Engavo: I think Mr. Hobbs was called in on this matter too and they were informed to go and have this stopped, cause these people don't have that right to be doing this, you know, and I don't recall any follow-up at no follow-up, as far as I, I was concerned.

Clyde Hobbs: Mr. Chairman.

Chairman: Mr. Hobbs.

Clyde Hobbs: The time Ben Miller and John Guina came here and appeared before the Council, there was several of the things said that I can't recall but one of them was, do we have the right to go back and forth to our place of employment? The answer from the Council was that we're not interfering with your rights, we're talking about what what Al Cook's doing, and I think this is what you're talking about now, I believe. We have a fine point here, you know, that up to now we've not discussed. The right of a member to go back and forth to work, you know, and I think that this is a.. the Bonatsies all along have been trying to get along on this matter, you know, I'd like to, I'd like to, you know, have it known that I understand this, and they've been trying to get the Bureau of Indian Affairs to give them protection in what they wanted. They've been trying to sort out between what has been traditional the people who run back and forth to their homes and what is not traditional in running a business, and it's clear to me what they're

Clyde Hobbs: talking about and they would prefer, I think, they did till now anyway, not interfere with what has been custom, you know but the custom now has been used to their disadvantage, to open a business and and claim that they're still using the traditional thing that the members are going back and forth through these allotments and, and they have that right because, you know, it's been established and this sort of thing. This has been the discussion, it was in discussion in front of the Council the other day.

Marvin Sonosky: Well, you know, that has, really has nothing to do with it. You own a piece of land, it's yours. If you want to permit people to cross your land because you like them, or your friends, or it doesn't bother you. Then you would do that if a guy's got to cross your land to go to some next farm to work or something of that manner. We're talking about a saloon. We're talking about drunks going back and, back through there driving their cars through and you've got your families and you kids. That's what they don't want and that's what you owe them something for. You have got to get that, go over there and put that chain across and post a policeman and notify Mr. Cook that that is going to be that way. Mr. Cook is preparing a bed of thorns for himself because the day will come, as sure as we're sitting here, when he's going to show up here for a license, either in his name or a dummy's name to run a saloon at that place, and he's going to have to get it from this Council. He's not going to get very much of a reception here, so I'm confident that that will be cured that way. There's no reason why these people aren't entitled that, that the more than all this conversation has indicated in getting from the United States.

Irving Bonatsie: Mr. Chairman, I have a comment and a question. In, while attending college, I attended executive training courses and in these courses, we were taught to nip something like this in the bud, something established, like a business. The time to do it is to do it before it becomes an established business and that means before the Grand Opening. Alright. Last night Mr. Cook had his Grand Opening, with the help of the BIA, the Law and Order and the Shoshone Council. Simply because they did not lift a hand and each one were shifting the, the problem back and forth, back and forth. Now, what is going to be done now is what we want to know.

Chairman: What do you want done?

Irving Bonatsie: Well, as

Chairman: Do you want

Irving Bonatsie: far as we can see it, is we don't want any kind of right-of-way given or easement or whatever.

Chairman: Do you want people that are not ranchers or have any business back in there prohibited from trespassing your property?

Irving Bonatsie: Yes.

Helena Bonatsie: Mr. Chairman. We're talking about Mr. Cook.

Chairman: That's right.

Helena Bonatsie: We're, we're not talking about the ranchers that live around there. They've given us a lot of respect and we give them the same in return, but this is involving Mr. Cook and that's who we're talking about.

Chairman: This is what I'm trying to get at. He's going to have numerous guests.

Helena Bonatsie: It's his problem if he can't get out of there, is what I'm trying to say. He's going to have to invest in a helicopter to get out of there because we are not going to give him an easement or a right-of-way and we want you to know that and everybody else here.

Chairman: Well, this is your privilege in this. By the way, on the Council, I'm intending to resign. If I'd stay on, I'm going to see, or try to see that your wishes are upheld. Mr. Harris.

Robert Harris, Sr.: This might go back a little bit further, you know, I, I know these people. They're my people. I know that they're fair people. But, prior to all of this, they attempted to get a right-of-way for a ditch... (and for water. And Cook would not agree that they could have even any access across his land in any way for the ditch.) Well, I don't know what it's...against the law... have no obligation, no way in the world. These trust allotments. The only time you can condemn and convey title to these allotments is Congress. You have your own Indian Court sitting down, sticking their nose into a matter that they have no more business of entering into than anything in the world. You have the policeman going up. I've no personal feelings against him. I certainly don't like the way this was handled. I feel that, first, his statement to her in regards to pigs and everything, whether it was a mistake or not, was planned, an attempt from right off the start to cow the Indians down. A mention that AIM members was here. These are not AIM members. These are property owners who have a

Robert Harris, Sr.: property right if anybody has a property right, they have. What is this Business Council going to do when Cook comes, when Cook comes in here for access to the Reservation to take his fishermen, his pack trips, his scenic views. What are you going to do, turn the reservation over to him?

Chairman: I can't assure him

Robert Harris, Sr.: How in the hell are you going to protect this Reservation from enroachment upon Whitemen, or are you going to sit here and take a painless termination while they take over your lands and everything else because they're good guys? And you think you've a bunch of Indians that would rather put their trust in a whiteman because he's got a little bit of money and he can give them. What does he expect when he walks in here? He walks. He expects Manhatten. Very same thing going on. A long time ago, the Indians gave their reservation away for hatchets, beans and everything else. Look at what's going on here. You're giving it away right now for a bunch of damn petty jobs.

Wayne Yourick: Mr. Chairman, I have my mother sitting here. She owns over half of an allotment and she can't lease it. She wants to use it, but now we got a whiteman in there with 150 head of cattle. That's the same story. If you don't stop them someplace, they just keep going. If you're going to give the Reservation to the whiteman, give it to him, but I say no. I want to keep my part.

Chairman: I think I asked the Realty officer to cancel that lease that he had drawn to cancel it.

Wayne Yourick: ....cancellation and Mr. Hobbs. I've been

Wayne Yourick: over here time after time. We asked them to write letters and do this and nothing was ever done.

Alfred McAdams: Well, Mr. Chairman.

Ralphaelita Stump: Mr. Chairman.

Alfred McAdams: Go ahead.

Ralphelita Stump: I have one other question I'd like to ask and, bring it before the Council here and the people that's involved. Yesterday, when this business of the right-of-way came up, we were informed by Mr. Keep that the man that we leased our property to gave a right-of-way to Mr. Cook after he'd leased this property.

Chairman: I don't think he had that right.

Alfred McAdams: Mr. Chairman. He can't do this.

Ralphaelita Stump: Didn't you say that he had gave a letter?

Archie Keep: I understoood that there was a letter out that gave Mr. Cook this whoever you leased this to, the right for him to cross there. This is Mr..... I never seen the letter. I just, I heard this.

Chairman: He might have gave a letter that he didn't object if the Bonatsies didn't.

Robert Harris, Sr.: Again you're talking about a right-of-way.

Chairman: That's right.

Clyde Hobbs: I think the right-of-way can only be granted by the owners.

Alfred Ward: Mr. Chairman

Chairman: Mr. Ward.

Alfred Ward: After, this situation has been up and down, I would like to ask Mr. Hobbs what he intends to do. As a member of the Shoshone Business Council and I feel that I'm asking on behalf of these Tribal members. Are you going to enforce the law?

Clyde Hobbs: Mr. Chairman.

Chairman: Mr. Hobbs.

Clyde Hobbs: That's rather easy to answer. I can answer yes. We have enforced the law, you know, but specifically the Council, to yet, has not said what their position was on this, so we're working with the Bonatsies, you know, I mean if the Council want to do anything about this or not. That's the question that has not been answered by the Council at any time. We are working with the Bonatsies.

Alfred Ward: I have to disagree with that. My understanding of what has been interpreted when we first met with you a month or so ago, when this first started and Mrs. Helena Bonatsie came in and met with us. We called you into the Shoshone Chambers and discussed with you, what right this man had to take advantage of these people and you expressed your trust responsibility, you told us what you were obligated under law to do. Now you haven't done this, and the incident that happened yesterday or any other incident cannot point that you have protected these people's rights, and it's immaterial whether the Business Council get involved. We're talking about them first, then the Tribal Council, we're supporting our action, and I don't

Alfred Ward: believe you've taken care of your responsibility.

Marvin Sonosky: Is there any Tribal land in there?

Clyde Hobbs: In that way they go through, I don't believe so, you know, it hasn't been a question, the other, the alternative route was quite a bit of Tribal land. They were talking to the Council about coming through.

Joe Engavo: Mr. Chairman.

Chairman: Mr. Engavo.

Joe Engavo: This is also as Mr. Hobbs stated here, the intent of the Business Council doesn't seem to be nothing, you know, here the Business Council called you in or it was the Shoshone Council called you in that they were building an access to that place over Tribal land. We definitely instructed you to go up there and block that road and then you come back with, say, well, they got two members and these two members have rights, you know, and we still said that, block that road. And another thing that I would like to make a comment on is here the Business Council is supposed to be the governing body of Tribes here. We're making, Mr. Hobbs and his employees over there make us look like dummies, when we called him over here and we tried to get him to exercise his trust responsibility and the only time these people respond is like when Al Cook calls and Mr. Keep just verified that a while ago. He did not want to go up there until Al Cook called. That's all I have to say.

Archie Keep: Mr. Chairman.

Chairman: Mr. Keep.

Archie Keep: Maybe I can clarify this, maybe I'm wrong, but I did receive a call yesterday morning from Helena Bonatsie. My understanding was that she was coming in to see the Superintendent. I have no reason to lie. It was my, as far as I understood she didn't want to see me, she was coming in. I did respond to Mr. Cook's call. But as far as, as my understanding of her wanting me to come out there and see this, I did not understand this.

Helena Bonatsie: Mr. Chairman. I think I called Mr. Keep in the morning and I told him, I said, could you tell me who the Chief of Police is. He said we have none right now but the acting chief is a Miller. And I told him no, I didn't want a Miller because I said this involves a Miller, so he says well o.k. he said and I asked him who, who all are the officers. He said Ferris, who is in Casper and he won't be back until Monday. So I said oh. And then I says who else, and he says I am. And I says who are you. He says Archie Keep. So I says oh, I says well, what I'm interested in is in, is in some officer coming out to Burris, I said because, I said we're having problems on a right-of-way. I told him. So he says, he says o.k., he says I'll call Mr. Hobbs and I said well, I'm going to go down to see Hobbs later on today. That was yesterday. So then he says and then I said this is Burris now. He says o.k., o.k. So then that was all that was said. And then right after I called him, well I got on the phone, I asked him if is Mr. Hobbs in now. Yes he is in right now. So then, I got I, I hung up the phone and I called Hobbs and then they told, they said whoever answered the phone said he was in session

Helena Bonatsie: over here. And so I said oh, o.k., thank you, and then I hung up again. This is when I called Joe and I knew for a fact that I'd just be sitting in the lobby two or three hours, wasting my time, while I could have been doing something else, because I knew he would be in here meeting all this time, see and this has happened to me several times.

Irving Bonatsie: Mr. Chairman.

Chairman: You through, Mrs. Bonatsie?

Helena Bonatsie: Yes.

Irving Bonatsie: In her telephone conversation with Mr. Keep when she called, she made sure she asked the question to Mr. Keep, do I have to be down there in person to file a complaint for a cop to come up to Burris and his reply was no, you do not have to. Whereby, at that moment she turned around and told him well, I'll be down there later to see Mr. Hobbs. Where now he says she, she said that she'd be down to see him or down to the Agency.

Joe Engavo: Mr. Chairman. I think one other thing, point that I was trying to, to bring out is when I made the comment that Mr. Keep only responded when Al Cook called. This isn't the only time, you know, that this type of response was shown by BIA. There's alot of times when these people come in there and negotiate several leases and whatever, right in BIA office and never inform the Business Council. And I certainly feel that Mr. Hobbs should at least have the courtesy to come over here and inform what the Business Council what's going on.

Clyde Hobbs: Mr. Chairman.

Chairman: Mr. Hobbs.

Clyde Hobbs: Does the Joint Business Council want us to prohibit any further work on that road?

Joe Engavo: Yes, Mr. Chairman, I'll move.

Chairman: How's that? The one at.

Clyde Hobbs: The one that, you know, developing that's going up in toward the mountain or going out on the Tribal land anywhere. Do you want us to stop any, any

Chairman: Yes. What's the wishes of the Council in this Tribal road that the two members are constructing?

Joe Engavo: Well, Mr. Chairman. I think people that request, that have range units up here have to come get permission. I can't see where this guy has even the right to. I don't know. I don't understand you Mr. Hobbs.

Marvin Sonosky: What, what Tribal land is this?

Joe Engavo: This is coming in from back of Stoll's and, and from Bob's creek side.

Helena Bonatsie: Over a range unit, over a range unit.

Joe Engavo: Over a range unit.

Marvin Sonosky: Is Cook staying up there?

Helena Bonatsie: Right.

Joe Engavo: Yes.

Marvin Sonosky: Well, then, that's what you're talking about.

Joe Engavo: Mr. Chairman, I move.

Robert Harris, Sr.: Has he applied?

Joe Engavo: No, he hasn't applied.

Alfred Ward: Mr. Hobbs has just now told us that Tribal members can build a road.

Clyde Hobbs: No, I didn't say that.

Alfred Ward: That was the impression that I got the day that Mr. Miller and them was in here, that a Tribal member had this right to go and construct a road or improve a trail and that's the way we all understood it, Mr. Hobbs.

Clyde Hobbs: I believe that you were listening to Ben Miller and John Guina tell you that they had that right and I never, it was implied that the Council didn't think they had that right, I understood that, but there was no action, Mr. Chairman, and I would appreciate, you know, just something, formal action, so we could say that the Council, in meeting, said that they wanted that stopped so.

Alfred Ward: Alright.

Clyde Hobbs: This was made.

Marvin Sonosky: As I understand that is somebody is unlawfully trespassing, doing damage to property, going out without any right and building on somebody else's land, that you won't do anything about that until you get affirmative action saying do something. Do your duty and protect this property. I just don't see that.

Clyde Hobbs: I'll tell you why I did that is because I

Clyde Hobbs: caused those people to come before the Council for that purpose so the Council could say that they did or did not want them and it was implied in the conversation as it is being done today, but it wasn't an action. They owned the land, Mr. Sonosky.

Marvin Sonosky: It should be the other way around. Those people should come before the Council and get permission to do it. Without permission they can't do it. That's the way it should go.

Clyde Hobbs: O.k.

Alfred Ward: Wasn't there a motion Mr. Hobbs, that day? I made the motion that day that these people no longer could do that. Evidently, it was misunderstood by everyone, but we voted on it.

Chairman: It's been moved by Mr. Engavo that Mr. Hobbs be instructed to have the construction of the road going into Al Cook's Dry Creek Lodge be stopped immediately. Is there a second?

Alfred Ward: Second.

Chairman: Second by Mr. Ward. You've all heard the motion, are you ready for the question?

Clyde Hobbs: Any road, Mr. Chairman, could I stop here? You talk about any development, any development of road in that area. See, this isn't a road going into Al Cook's This is a road going from Al Cook's up into the mountains for packers and outfitters.

Alfred Ward: No, well then that's another road. The road we discussed the other day is going up past Hagerson's and going across so that these

Alfred Ward: people can bypass Bonatsies land to get in there and that's the one we discussed the other day, now we have another road.

Clyde Hobbs: They're not building that road. They are not working on that road. They're working on another road.

Alfred Ward: Because that's the road that I was referring to is that we made a motion that they stop construction of that because no Tribal member can go on their own and improve a trail or construct a road without coming to the soverign power which is the Business Council.

Marvin Sonosky: May I make a suggestion? It seems to me that so that the Agency won't be under any misunderstanding of who's who, that you adopt a resolution providing that Be it resolved, that no road shall be constructed across Tribal land without the consent of the Tribe first obtained in writing and further provided that any road now under construction by anyone on Tribal land shall immediately be halted, such construction work shall immediately be halted, and such persons immediately notified that no further work be done without prior permission from the Joint Business Council obtained in writing.

Chairman: Do you want to amend your motion?

Joe Engavo: Oh, Mr. Chairman. Either reconsider it and maybe putting this language into the motion. Amending it, I guess.

Chairman: Mr. Engavo has amended his motion to have a resolution drafted and that these people be notified immediately after action is taken. Is there a second?

Alfred Ward: I second that.

Chairman: Second by Mr. Ward, you've all heard the motion, are you ready for the question? All in favor of the motion, signify by raising your right hand. Four Shoshones and five Arapahoes voting for the question. Motion is carried.

Ernest Hanway: Mr. Chairman, in the meantime, for Mr. Cook and other people trespassing through these individual allotments, I believe the allottees don't want no trespass through there, just to the people that they know. I believe Mr. Hobbs should more or less enforce that, which he's been instructed once before to do so. And let's have him follow through on some of the recommendations that the Business Council has instructed him to do. I mean this would be understood amongst the allottees along with the Joint Council.

Chairman: Mr. Hobbs, would you, can you instruct Mr. Cook that he's to stay off of these people's allotments? That the Council supports them on their actions.

Ralphaelita Stump: Mr. Chairman.

Chairman: Mrs. Stump.

Ralphaelita Stump: We were just discussing this a minute ago and I think that my sister and the rest are all in agreement that they want this gate chained. I would like to have somebody else, possibly an officer, go up and do the chaining due to the fact that we don't want to cause any more problems and we don't want to be implicated in any instigation whatsoever, in causing any problems. So we'd like the officers to go up and chain the gate.

Chairman: Do you want to chain everybody out or do you want your neighbors to go back and forth?

Ralphaelita Stump: This is only one place and that's Mr. Cook's.

Marvin Sonosky: Mr. Chairman, maybe that could be done in the form of a resolution too. It could be something like Whereas, (Dry Creek Lodge had opened up a liquor establishment without a Tribal license in violation of the Federal law in such case provided)* Whereas, there was no access to the land in which Dry Creek Inn was located except across trust allotments, and Whereas, the owners of the trust allotments have repeatedly made it clear that they do not wish any traffic of any kind to or from the Dry Creek Inn to cross their trust allotments and Whereas, this has been brought to the attention of the Wind River Indian Agency, and Whereas, in spite of these requests, the Grand Opening of the Dry Creek Lodge took place on Friday, May 17, 1974, without any advance notice to the Dry Creek Lodge that it was the wishes of the allotment owners that traffic of any kind to or from that Lodge cross their allotments and Whereas, the allotment owners have appeared before the Joint Business Council in the presence of the Superintendent and the Federal Officer and have discussed this matter, and Whereas, they have expressed their wish that the entrance to the access across their allotments be chained by the Wind River Indian Agency and that written and oral notice be delivered to the Country Inn Lodge.

Chairman: Dry Creek Lodge.

*Note: All material within parentheses was deleted from provided transcript.

Marvin Sonosky: Huh?

Chairman: Dry Creek Lodge.

Marvin Sonosky: Dry Creek Lodge, that the chain would be maintained by the police force of the Wind River Indian Agency, and that a, and be it further resolved that a police car be maintained for a reasonable period to insure that the chain and prevention of access for traffic to and from the Dry Creek Lodge is prevented. I don't know if I gave you if I got it all in the Whereases, and the now therefores.

Alfred McAdams: I move, Mr. Chairman, to support this resolution.

Chairman: It's been moved by Mr. McAdams that the Joint Business Council will support the resolution in behalf of the Bonatsies, and asking Mr. Hobbs to carry out the instructions, is there a second?

John Warren: I second it.

Chairman: Second by Mr. Warren, you've all heard the motion, are you ready for the question? All in favor of the motion, signify by raising your right hand. Opposed? Five Arapahoes and four Shoshones. Voting for the question, motion's carried. Chairman not voting. Is that all you have? How soon can you get the chain up there Mr. Hobbs?

Marvin Sonosky: Close the Saturday night business.

Clyde Hobbs: How soon can you get me that resolution?

Ernest Hanway: Get it today, just have it typed off and have the two chairman's to sign it.

Marvin Sonosky: Now, do you think that the action has to wait on a paper or.

Clyde Hobbs: Not necessarily.

Marvin Sonosky: Do you want to show them this?

Clyde Hobbs: I wanted it, and the other thing, I want to make sure we notified Dick Thomas, you know, the U. S. attorney, that we're going to do this. But I would say it would probably be Monday evening, you know, if you wanted time.

Marvin Sonosky: Now, you'll let him have his Saturday night business, then?

Helena Bonatsie: Mr. Chairman, what we're trying to get to is stop his establishment before it is established and this is what we're trying to talk about and we want it stopped now, this moment if possible. Not, not who knows, look what Hobbs has been doing. We've been coming to him everyday, I mean most everytime we come up with this thing and he's been sitting here doing nothing. Who knows, he might, he might not do that. Monday night he might not do it, next week, it will go on and on.

Marvin Sonosky: Well, you might call the United States Attorney and the United States Attorney might want to think about it.

Helena Bonatsie: Yes.

Alfred Ward: This is the intent, I think.

Marvin Sonosky: Well, the land owner has the right to do this on his own land. It doesn't take the United States Attorney to do it.

Clyde Hobbs: That's right.

Marvin Sonosky: Close the door to my house, there's no difference between the door to my house and putting a chain across my driveway. It's mine and I don't have to go to the United States Attorney to do it. No. All we're asking, asking you to do is protect them in that right.

Clyde Hobbs: This is correct but you ask me to put the chain there, you know, this is different. I told the Bonatsies all along they had the right to chain this. But now you're asking that we, to put the chain there and I, you know, we carry out the law under the U.S. Attorney.

Marvin Sonosky: Alright, to me it wouldn't make any difference if the Bonatsies put the chain there in your presence, they want protection.

Clyde Hobbs: I know they do and I intend to do that, but if we carry out.

Marvin Sonosky: Two neighbors with rifles standing by, then they put up a chain.

Chairman: Do you folks have a chain long enough to chain that off?

Ralphaelita Stump: I doubt it.

Chairman: Ropes or anything?

Clyde Hobbs: I would expect that we'd use a wire cable, you know, if we're going to use, you know, if we're going to chain that. I was thinking that we'd use wire cable with a padlock.

Chairman: I was going to say, do you have anything

Chairman: that you can put across there, put it across, then we can send these police up to maintain it. Barbed wire or anything you have.

Marvin Sonosky: You got to have a police there to protect them.

Clyde Hobbs: After I have the policeman to protect them, then I would like to notify the U.S. Attorney because we carry out the law, as you know, Mr. Chairman, under the direction of the U.S. Attorney and we'd like to do exactly what these people would want to do tonight. But if the U.S. Attorney would tell me Monday that, you know, we better not say what did Dick Thomas say, you know, I mean, you know, this is what we're talking about.

Alfred Ward: Mr. Chairman, I can't quite, if they have the right to protect their property and you have the trust responsibility to help them protect their property. I think that the U.S. Attorney, if says no, you still haven't done anything wrong, have you? I mean, what would what would be the fear of protecting these people's rights and having policemen there to say this. And if the U.S. Attorney says you shouldn't do it, well, fine. We're with the U.S. Attorney, but we're protecting these people's rights today.

Marvin Sonosky: I have a suggestion. Are these Tribal policemen?

Clyde Hobbs: There's no Tribal policemen here, they're all Federal policemen.

Marvin Sonosky: They're all Federal.

Clyde Hobbs: Yes, they are. Tribes don't contract for

Clyde Hobbs: anything here. We run this just like we run the Welfare Program or anything else.

Marvin Sonosky: Because if these were Tribal policemen, you could send them out yourself.

Joe Engavo: How about the Game Wardens? It seems like they have the same authority to arrest them.

Alfred Ward: We could put the Game Wardens up there.

Clyde Hobbs: I wouldn't send a Game Warden.

Alfred Ward: They don't have much authority, but.

Joe Engavo: Yeah, that's right, their under the direct technical supervision of, of Keep and Hobbs.

Marvin Sonosky: I have one other suggestion Mr. Wilkinson, why the United States Attorney, why not your area office?

Clyde Hobbs: We could check that out.

Glen Wilkinson: If you go to the United States Attorney, this would probably be a month or never. He may want.

Alfred Ward: Well, look how many.

Glen Wilkinson: To send somebody down to look the situation over.

Alfred Ward: It took us for how many years to get a trespassing case against Mr. Meeks and then when he finally sold his cattle out, the cattle and all, and was out of the business, well, then we weren't able to collect the full amount because he quit doing his trespassing, we collected maybe half of this. I

Alfred Ward: mean during the course of time he ate up the grass.

Chairman: Mr. Hobbs, if they spread wire and things up there, would you send one of your police to maintain it?

Clyde Hobbs: Yes sir, I would.

Ralphaelita Stump: But would they be with us.

Clyde Hobbs: Ralphaelita, I think they would. I don't think they'd have doubt as to, you know, I know you are, you know, are, you know, coming there most of the night and day. I really, confident you don't have any doubt but what I intend to do and it was maybe slower than you want, to protect your rights, and the police work for me and I would intend that they would protect your rights and, and, and I have well, the Courts have said we'll, I have no reason to lie. If I didn't think it was right I, I might intend to lose in. . . . . .I think you're right that you could put a bar across that gate and to maintain it. Now that doesn't mean he can't come through there and cut it and a day after that there insues an argument, you know, about what we're talking about. But, I intend that we enforce your, you know, the, the rights you have. I have, you know, I'm getting older every day and I'm not you know, as impetuous as, you know, as quick to react as I was at one time. And I don't feel that I want to go out here. Some people when they're in trouble, they think that the Superintendent have all kinds of powers and other times, when they don't like, I don't have any power but I try to get somewhere in between that, you know, and I have acted rather spontaneously on some things and I've gotten a-

Clyde Hobbs: way with it. You know, I don't know how many times I can get away with acting spontaneously on the things that we sit here and say are right, you know. I need some other advice to decide this is it.

Chairman: So they barricade it tonight, then you will have the police there.

Clyde Hobbs: That's right. Now we've been dealing, in talking with the Bonatsies and they can tell us what they want, you know, on this thing. And we'll support what they want.

Marvin Sonosky: Well, two, two policemen out there and Bonatsies to barricade it tonight. Two policemen standing there and this is the way to do it, to bust that Saturday night business, got started.

Ralphaelita Stump: And if, if they want to come this evening, they can stop at the house and, and let us know that they're going up there and we will immediately follow them and put up the barricade or whatever. But we want them there to just for our protection and we don't want any shooting or, or anything of that nature. And we don't want to get anybody hurt, we don't want to get hurt and that's the reason we're asking for the officers to be there when we do this.

Marvin Sonosky: I would like to see it done that way for another reason is going to be any controversy and joined into any lawsuit. I'd like to see Mr. Cook bring them.

Chairman: So would I.

Marvin Sonosky: It come out much better.

Clyde Hobbs: Off the record a minute.

RESOLUTION
JOINT BUSINESS COUNCILS OF THE
SHOSHONE AND ARAPAHOE TRIBES
WIND RIVER RESERVATION
FORT WASHAKIE, WYOMING

Resolution No. 3415

WHEREAS, Dry Creek Lodge has opened up a business establishment, and

WHEREAS, There was no access to the land in which Dry Creek Lodge was located except to cross trust allotments, and

WHEREAS, The owners of the trust allotments have repeatedly made it clear that they do not wish any traffic of any kind to or from the Dry Creek Lodge across their trust allotments, and

WHEREAS, This has been brought to the attention of the Wind River Indian Agency, and

WHEREAS, In spite of these requests the Grand Opening of the Dry Creek Lodge took place on Friday, May 17, 1974, without any interference on the part of the Agency and without any advanced notice to Dry Creek Lodge that it was the wishes of the allotment owners that no traffic of any kind to or from that Lodge across their allotments, and

WHEREAS, The allotment owners have appeared before the Joint Business Council in the presence of the Superintendent and a Federal officer and have discussed this matter, and

WHEREAS, They have expressed a wish that the entrance to the access across their allotments be chained by the Wind River Indian Agency and that written and oral notice be delivered to the Dry Creek Lodge that the chain will be maintained by the police force of the Wind River Indian Agency, and

BE IT FURTHER RESOLVED, That a police car be maintained for a reasonable period to insure that the chain and prevention of access for traffic to and from the Dry Creek Lodge is prevented.

CERTIFICATION

WE, THE UNDERSIGNED, as Chairmen of the Joint Business Council of the Shoshone and Arapahoe Tribes, hereby certify that the Joint Business Council is composed of twelve (12) members, six (6) members of the Shoshone Tribe and six (6) members of the Arapahoe Tribe, of whom four (4) members of the Shoshone Tribe and six (6) members of the Arapahoe Tribe, constituting a quorum, were present at a meeting duly and regularly called, noticed, convened and held this 18th day of May, 1974; that the foregoing resolution was duly adopted by the affirmative vote of nine (9) members, Chairman not voting; and that the resolution has not been rescinded or amended in any way.

Done at Fort Washakie, Wyoming, this 18th day of May, 1974.

/s/ Alfred McAdams, Sr.
Alfred McAdams, Sr., Chairman
Shoshone Business Council

/s/ Jesse Miller
Jesse Miller, Chairman
Arapahoe Business Council

Resolution No. 3415

Supreme Court, U.S.
FILED
NOV 26 1980
MICHAEL RODAK, JR., CLERK

No. 80-613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SHOSHONE and ARAPAHOE TRIBES,
Petitioners

v.

DRY CREEK LODGE, INC., *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR THE SHOSHONE AND ARAPAHOE TRIBES

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November 1980

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REPLY BRIEF FOR THE SHOSHONE AND ARAPAHOE TRIBES

Respondents' sole argument in opposition to the petition filed by the Tribes is that Article I of the Treaty of July 3, 1868—which requires the Indians to turn over "bad men" to the United States—constitutes a waiver of tribal immunity from suit (Op. pp. 7-10; Treaty of July 3, 1868, 15 Stat. 673, Article I). The lack of substance of this argument illustrates the lack of legal support for respondents' position that a money judgment may be awarded against the Tribes themselves.

The "bad men" argument is incorrect for at least the following reasons: [1]

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[1] In addition, the argument was not made below and is thus improper to raise in the Supreme Court for the first time.

1. The "bad men" clause refers to the duty of the Tribes to turn over Indians for criminal prosecution—"*bad men among the Indians* * * * to be *tried and punished.*" Article I (emphasis added). It is thus inapplicable in this civil case.

2. The individual Indians who blocked the road—the "bad men", if respondents' case had merit—were all defendants in this action. Thus, even if this article were applicable, the Tribes fulfilled their duty to "deliver up the wrong-doer to the United States, to be tried and punished according to the laws." The individual Indians simply were held not liable.

3. Finally, if the article were applicable and the Tribes had failed in their duty to make the individual wrong-doers available for trial, the exclusive remedy under the Treaty would be an administrative proceeding before the Commissioner of Indian Affairs.

Article I of the treaty with the Shoshone is no waiver of the Tribes' immunity from suit. The petition should be granted and the decision below reversed.

Respectfully submitted,

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November 1980

MOTION FILED
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Respondents.

MOTION OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Respondents.

MOTION OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 42(3), the Association on American Indian Affairs, Inc., a tax-exempt organization having its principal office at 432 Park Avenue South, New York, New York 10016, moves the Court for leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari in the above-captioned case. The petitioners, the Shoshone and the Arapahoe Tribes, have consented to the filing of this brief; the respondents, Dry Creek Lodge, Inc., *et al.*, have refused so to consent.

The Association on American Indian Affairs, Inc., is a non-profit membership corporation organized under the laws of the State of New York for the purpose, *inter alia*,

of protecting the rights of self-government exercised by Indian tribes. The Association is the largest Indian-interest organization in the United States, and is nationwide in scope, with a membership of 50,000 that consists of both Indians and non-Indians.

The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of a brief with this Court in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and the filing of *amicus curiae* briefs in *Andrus v. Glover Construction Co.*, 100 S. Ct. 1905 (1980), *Washington v. Washington State Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972).

The Association seeks to file an *amicus curiae* brief in this case because of the far-reaching impact the decision below will have on the ability of Indian tribes to exercise local autonomy and to provide needed governmental services. The immediate parties to the suit have focused primarily upon the circumstances surrounding their particular dispute and are, of course, less concerned with the broader consequences upon every tribal government of

the lower court's decision. To apprise the Court of this impact and to place the dispute in its proper context, the Association respectfully requests that its motion for leave to file the attached brief *amicus curiae* be granted.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-613

SHOSHONE AND ARAPAHOE TRIBES,

Petitioners,

v.

DRY CREEK LODGE, INC., *et al.*,

Respondents.

BRIEF AMICUS CURIAE OF THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The Association on American Indian Affairs, Inc., is a non-profit membership corporation organized under the laws of the State of New York for the purpose, *inter alia*, of protecting the rights of self-government exercised by Indian tribes. For many years the Association has been the largest Indian-interest organization in the United States, with a membership nationwide of over 50,000 that consists of both Indians and non-Indians. The Association previously has filed *amicus curiae* briefs with this Court in major cases affecting Indian rights, such as

Washington v. Washington State Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979), *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

This case presents a question of great and continuing concern to the Association: whether the Indian Civil Rights Act of 1968 waives implicitly every Indian tribe's traditional immunity from suit. In the instant proceeding, the Association is concerned with that broad question in a specific context -- namely, whether the Indian Civil Rights Act subjects tribes to money-damage suits by non-Indians in a federal forum.

The importance of this question to longstanding principles of Indian self-determination cannot be overemphasized. If the Court of Appeals' decision is allowed to stand, already deficient tribal economies will be severely strained by the cost of defending numerous suits and of paying deep-pocket money judgments. Vital tribal programs designed to provide needed services or to advance economically the status of tribal members will face new and unprecedented monetary shortfalls, while the inability of tribal governments to satisfy pressing needs of the populace will cause disrespect for the sovereign's authority. Qualified tribal members will not serve in their government from fear of personal liability or harassing suits. Tribal forums will find their authority further undercut as important local issues involving non-Indians are decided by federal courts less sensitive to tribal customs and mores. Indian tribes will be denied the opportunity themselves to determine where, if, how or in what manner tribal immunity needs to be circumscribed in order to fulfill the purposes of the Indian Civil Rights Act, and instead will face intolerable pressures to waive completely their sovereign immunity.

Amicus submits the attached brief in support of the petition for a writ of certiorari to assist the Court in recognizing that the decision of the court below badly misconstrues the purpose and meaning of the Indian Civil Rights Act, contravenes numerous decisions of this Court concerning the nature and scope of tribal immunity from suit, and, if uncorrected, could have a devastating impact upon tribal autonomy and self-sufficiency. The immediate parties are likely not to consider the broader ramifications of the Court of Appeals' decision, and this discussion by *amicus* may be helpful to the Court in considering the importance of the case.

STATEMENT OF THE CASE

For purposes of this brief, *amicus curiae* adopts the "Statement of the Case" found in the petition for a writ of certiorari at pages 3-8.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS' DECISION JEOPARDIZES THE CONTINUED VIABILITY OF INDIAN TRIBAL GOVERNMENTS.

The Court of Appeals' holding constitutes the first appellate decision sanctioning the award of money damages against an Indian tribe in any forum. If not reversed, the adverse impact such a ruling will have upon Indian self-determination and economic well-being cannot be overstated.

At the most immediate level, the lower court's decision that the Indian Civil Rights Act contains a waiver of sovereign immunity for the benefit of non-Indian plaintiffs

will vitiate the "firm federal policy of promoting tribal self-sufficiency and economic development," *White Mountain Apache Tribe v. Bracker*, 100 S. Ct. 2578 (1980). *See, e.g.*, the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§450 *et seq.*; the Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.*; the Indian Reorganization Act of 1934, 25 U.S.C. §§461 *et seq.* The fiscal realities of Indian life are such that the inescapable costs even of successfully defending civil suits in a distant forum, not to mention unexpected (and possibly undeserved) large money judgments,[1] will seriously impair the operations and thereby the effectiveness of tribal governments. Specifically, the lion's share of tribal income now is committed to projects designed to provide at least minimum levels of governmental services on the reservation and to improve the economic level and employment of Indians thereon. By opening the door to suits by non-Indians, however, the lower court's ruling will result in reducing tribal initiatives and simultaneously in draining tribal finances at the expense of achieving these essential goals. Indeed, since Indians are among the poorest minority groups in America and because most tribal income results from fixed annual rentals and the sale of depletable natural resources, rather than from taxes, tribal governments often will not be able to raise the revenues needed both to finance additional litigation and to maintain existing governmental services.

The effect of the lower court's decision, then, cannot be reconciled either with Congress' general policy to

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[1] Although tribal budgets are quite small in terms of the needs which must be met, to an individual juror tribes might seem quite wealthy, and the danger of deep-pocket jury verdicts against tribes would be quite real, as the facts of this case illustrate.

foster tribal self-sufficiency or with its particular intent in the Indian Civil Rights Act to further Indian self-government, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978). The lower court's decision, moreover, is particularly hard to defend in that, despite the greater need of Indian tribes for immunity from suit, the decision foists upon tribal governments a broader waiver of immunity for non-Indian plaintiffs than either the federal or most state governments have seen fit to bestow upon their own citizens.

In an even more fundamental sense, the Court of Appeals' decision will be destructive of tribal sovereignty. The success of Indian autonomy depends largely upon the ability of tribal governments to attract qualified people into public service. The lower court's conclusion that tribes no longer are immune from certain suits for money damages, however, raises serious questions regarding the ability of tribal officials to claim the benefit of the tribes' previous immunity from suit. *See Ex parte Young*, 209 U.S. 123 (1908); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Davis v. Littell*, 398 F.2d 83, 84 (9th Cir. 1968), *cert. denied*, 393 U.S. 1018 (1969). The uncertainties raised by the lower court's holding will deter many qualified Indians from serving in their government and will dissuade those serving from vigorously prosecuting their duties.[2]

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[2]The relative poverty of many tribal governments increases the risk that an officer may be faced with a personal judgment for attempting to fulfill his duties. At a minimum, many tribal governments will be unable or unwilling to defend or reimburse officials who arguably exercised poor judgment in delimiting their lawful authority.

Equally detrimental to tribal autonomy will be the effect of the Court of Appeals' decision in pre-empting a balanced, evolutionary response by each tribe to its own immunity in a manner consistent with its sovereign status and promotive of its self-government. As tribes are well aware, the legislative history of the Indian Civil Rights Act indicates that tribal failure to enforce and apply the substantive provisions of that Act will result in additional federal remedies less desirable than those presently found in the Act. *See, e.g.,* 113 Cong. Rec. 13473 (1967) (Statement by Senator Ervin); *Santa Clara Pueblo v. Martinez, supra.* That Act gave tribal governments every incentive to determine where, how, and in what manner the mandates of the ICRA could be satisfied with the least disruption to their form of government and their cultural values.[3]

The decision below, however, sweeps aside this self-determined, developmental response to tribal immunity, and subjects tribes to suits in federal court whenever the plaintiff is a non-Indian. Moreover, regardless of any tribally adopted qualifications upon sovereign immunity, complaints by non-Indians still would be cast in the language of civil rights deprivations in order to ensure entry into a federal forum where tribal customs and values would be largely ignored. The result would be to undermine tribal authority as prospective Indian plaintiffs saw their governments permit limited tribal funds to be

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[3]Tribes might find themselves, for example, able to waive their immunity from torts up to the extent of their insurance coverage. Alternatively, injunctive and declaratory relief may be fully adequate for other types of suits. Similarly, certain issues may raise sensitive cultural issues which could be resolved satisfactorily only in a tribal forum.

expended to reimburse non-Indians for wrongs which are not subject to redress if committed against Indians. Tribes would face intolerable pressures to waive their immunity for their own citizens, even though economically or politically such action would be self-defeating.

In short, unless this Court grants the writ of certiorari and reaffirms its decision in *Santa Clara Pueblo v. Martinez*, *supra*, Indian self-government may be harmed irreparably.

II.

THE DECISION OF THE COURT OF APPEALS CONTRAVENES DIRECTLY LONGSTANDING PRECEDENTS OF THIS COURT UPHOLDING TRIBAL IMMUNITY FROM SUIT.

The sovereign status of Indian tribes, evidenced by treaty and recognized judicially since the earliest day of the Republic, is beyond question. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *United States v. Kagama*, 118 U.S. 375, 381-82 (1886). A principal attribute of a tribe's sovereign status, also long recognized and continuously given effect, is its immunity from suit absent express consent from Congress. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Puyallup Tribe, Inc. v. Washington Dep't of Game*, 433 U.S. 165 (1977); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940); *Turner v. United States*, 248 U.S. 354 (1919); *Thebo v. Choctaw Tribe*, 66 F. 372 (8th Cir. 1895).[4] As

[4]Despite conquest, the full powers of internal sovereignty are vested in Indian tribes and in their duly constituted organs

[footnote continued]

an attribute of the tribes' pre-existing sovereign status (and not as an application of their immunity from suit), tribal government actions are not limited by constitutional civil rights guarantees applicable to federal or state governments. *Talton v. Mayes*, 163 U.S. 376 (1896); *Santa Clara Pueblo v. Martinez*, *supra*; *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959).

In *Santa Clara Pueblo v. Martinez*, *supra*, this Court exhaustively reviewed the structure and legislative history of the Indian Civil Rights Act (ICRA). The Court there held that the ICRA modified the tribes' sovereign status to the extent that many of the civil rights guarantees previously applicable only to federal or state governments were now applicable to tribal government actions, but also held that the Act had not affected a distinct aspect of sovereignty, tribal immunity from suit. More specifically, since the Act had not expressly waived the tribe's immunity from suit, and since the legislative history contained no unequivocal expression of an intent to waive this immunity, the Court concluded in *Martinez* that "suits against the tribe under the ICRA are barred by its sovereign immunity from suit." 436 U.S. at 59.

The Court of Appeals in this case ruled that when the plaintiff is a non-Indian, seeking money damages for

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except as expressly otherwise qualified. *See, e.g.*, Cohen, *Handbook of Federal Indian Law*, 123 (1942); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89, 94 (8th Cir. 1956). As a concomitant of this sovereignty, tribes are immune from suit, and such immunity has long been held to be waived only upon express consent. *United States v. United States Fidelity & Guaranty Co.*, *supra*, 309 U.S. at 512-14; *United States v. King*, 395 U.S. 1 (1969); *Santa Clara Pueblo v. Martinez*, *supra*, 436 U.S. at 58-59.

alleged violation of his constitutional rights, a federal court has jurisdiction over a suit against sovereign Indian tribes, or, in other words, that the ICRA implicitly waived tribal immunity under such circumstances. Yet, judicial recognition of a tribe's immunity from suit has never previously depended upon whether the plaintiff was a non-Indian or an Indian. *Compare Puyallup Tribe, Inc. v. Washington Dep't of Game, supra* (non-Indian plaintiff); *United States v. United States Fidelity & Guaranty Co., supra* (non-Indian plaintiff); *Turner v. United States, supra* (non-Indian plaintiff); *Bottomly v. Passamaquoddy Tribe,* 599 F.2d 1061 (1st Cir. 1979) (non-Indian plaintiff); *Thebo v. Choctaw Tribe, supra* (non-Indian plaintiff) *with e.g., Santa Clara Pueblo v. Martinez, supra* (Indian plaintiff). Similarly, tribes have been held immune from suit when the plaintiff sought monetary damages, *United States v. United States Fidelity & Guaranty Co., supra; Turner v. United States, supra,* and where the plaintiff sought declaratory or injunctive relief, *Santa Clara Pueblo v. Martinez, supra; Puyallup Tribe, Inc. v. Washington Dep't of Game, supra.* Tribal immunity and tribal sovereignty have also been respected when the plaintiff has raised constitutional challenges. *Santa Clara Pueblo v. Martinez, supra*; *Talton v. Mayes, supra. Cf. Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 (1949) (A suit may "fail as one against the sovereign even if it is claimed that the officer being sued has acted unconstitutionally. . . ."); *United States v. Testan,* 424 U.S. 392, 401-02 (1976) (Monetary relief against United States for even constitutional challenges would not be permitted unless the sovereign had expressly mandated such relief); *Iowa Public Service Co. v. Iowa State Commerce Comm'n,* 407 F.2d 916 (8th Cir.), *cert. denied,* 396 U.S. 826

(1969) (Sovereign immunity barred suit against state even though plaintiff asserted denial of due process).[5]

Amicus respectfully suggests that a writ of certiorari should be issued to review and reverse the Court of Appeals' doubtful determination of what otherwise seems a well-settled question of sovereign immunity.

III.
THE LOWER COURT'S DECISION IS INCONSISTENT WITH CONGRESSIONAL INTENT IN ENACTING THE ICRA

As this Court noted in *Santa Clara Pueblo v. Martinez*, 436 U.S. at 59, the Indian Civil Rights Act has no significant legislative history expressing a congressional intent to waive tribal immunity from suit. Particularly, there is a total absence of evidence supporting an intent to waive this immunity only for non-Indian plaintiffs.

In *Santa Clara*, this Court held the ICRA did not waive the sovereign immunity of the tribe or its officers when an Indian sued his tribe or its agents for alleged constitutional violations. Yet, the initial and predominate concern of Congress in enacting Title I of the Indian Civil Rights Act, 25 U.S.C. § § 1301-03, was to "protect individual *Indians* from arbitrary and unjust actions of tribal

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[5] A felt circumstance of particular, if not primary, importance to the Court of Appeals was the need to provide plaintiffs in this case with some forum for settlement of their grievances. 623 F.2d at 684, 685. Courts, however, have not hesitated to limit a plaintiff's remedies against the sovereign only to those expressly provided by statute even though the claimed rights might not adequately be vindicated by those express remedies. *Dugan v. Rank*, 372 U.S. 609 (1963); *Larson v. Domestic & Foreign Commerce Corp., supra; Simons v. Vinson*, 394 F.2d 732 (5th Cir.), *cert. denied*, 393 U.S. 968 (1968); *Switzerland Co. v. Udall*, 337 F.2d 56 (4th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965).

governments" by securing "*for the American Indian* the broad constitutional rights afforded to other Americans," *Senate Committee on the Judiciary, Protecting the Rights of the American Indian,* S. REP. No. 841, 90th Cong., 1st Sess. 6 (1967) (emphasis added); *Santa Clara Pueblo v. Martinez,* 436 U.S. at 61, 62.

Given Congress' predominate concern in enacting the ICRA to protect the rights of individual Indians in their relations with their tribal governments,[6] and given this Court's determination that the Act did not waive tribal immunity in constitutional challenges by an Indian to actions of his tribal government, it is inconceivable that Congress could be presumed to have intended to waive that immunity when a non-Indian sued a tribe.[7]

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[6]Statutory revisions expanding ICRA protections to non-Indians appear to have been an afterthought. *See* Burnett, *An Historical Analysis of the 1968 "Indian Civil Rights" Act,* 9 Harv. J. Legis. 557, 602 n.239 (1972); *Dodge v. Nakai,* 298 F. Supp. 17, 24 (D. Ariz. 1968).

[7]What little legislative history there is supports this conclusion. As noted in *Santa Clara,* 436 U.S. at 66-68, Congress rejected proposals permitting *de novo* trials in federal courts and authorizing the Attorney General to investigate complaints and bring suit in federal courts. *See* Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act,* 20 S.D.L.Rev. 1, 10-20 (1975). Congress' rejection of proposals requiring federal court enforcement of the ICRA is contrary to the lower court's decision to permit such suits by non-Indians.

Similarly, the costly impact of the Court of Appeals' decision is inconsistent with Congress' decision to remove many federal constitutional protections too costly to tribal governments. *See, e.g., Constitutional Rights of the American Indian: Hearings on S.961-S. 968, S.J. Res. 40 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 89th Cong., 1st Sess. 17-19, 64-65 (1965); Burnett, *supra* note 6 at 590-91. Thus the right to

[footnote continued]

CONCLUSION

For the foregoing reasons, *amicus curiae* urges the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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counsel is at defendant's expense and the right to jury trial in civil actions of $20 or more was eliminated; grand jury indictments for felonies are not required; and six-person juries are permitted.

MOTION FILED
NOV 14 1980

No. 80-613

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ARAPAHOE AND SHOSHONE INDIAN TRIBES,

Petitioners,

v.

DRY CREEK LODGE, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION TO FILE BRIEF AMICI CURIAE

and

BRIEF OF AMICI CURIAE

of

PUEBLO OF COCHITI, PUEBLO OF ISLETA, PUEBLO OF JEMEZ, PUEBLO OF NAMBE, PUEBLO OF SANDIA, PUEBLO OF SAN ILDEFONSO, PUEBLO OF SAN JUAN, PUEBLO OF ZIA and ALL INDIAN PUEBLO COUNCIL, INC.

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Come now the PUEBLO OF ISLETA, the PUEBLO OF JEMEZ, the PUEBLO OF NAMBE, the PUEBLO OF SANDIA, the PUEBLO OF SAN JUAN, the PUEBLO OF ZIA, and the ALL INDIAN PUEBLO COUNCIL, INC., by and through their attorney, USSERY & PARRISH, P.A., and PUEBLO OF COCHITI and PUEBLO OF SAN ILDEFONSO, by and through their attorneys, CLAYBURGH, ASHBY, ROSE and PASKIND, P.A., and allege:

1. ALL INDIAN PUEBLO COUNCIL, INC., is an organization consisting of the nineteen (19) Indian Pueblos in the State of New Mexico, a non-profit corporation under the laws of the State of New Mexico, the purpose of which is to act in concert for the advancement of goals common to the Indian Pueblos of New Mexico.

2. The movant Indian Tribes are each Indian Tribes duly recognized by the United States, exercising powers of self-government.

3. All of the movants would be profoundly and adversely affected if the decision herein by the United States Court of Appeals is allowed to stand.

4. Consent has been obtained from the Petitioners to file this motion and a brief amici curiae in this cause. Consent has not been obtained from the Respondents.

5. The basic legal questions of law herein are:

(A) Did *Santa Clara v. Martinez,* 436 U.S. 49 (1978), reaffirm the Doctrine of Sovereign Immunity for Indian Tribes and thereby protect the tribes from suits by all third parties?

(b) Did the *Martinez* case merely establish that only tribal members are prohibited from suing a tribal government for matters relating to the internal workings of tribal government?

These questions are of utmost concern and importance to the movants herein for the reason that the decision of the Tenth Circuit Court of Appeals in *Dry Creek Lodge, Inc., et al., vs. Arapahoe and Shoshone Tribes,* Cause No. 78-1999 (10th Cir., June 20, 1980), if affirmed, will severely cloud the long-standing traditions of the movants, endanger tribal sovereignty, and again open all tribal governments to a myriad of suits of all types and, moreover, will severely burden Federal District Courts in "Indian country."

6. The above questions of law may well not be adequately presented to this Court for reason that the facts presented to the trial court, as reviewed by the Tenth Circuit, do not show the much broader impact this decision would have on other tribes in other circumstances.

7. The movants desire to submit a brief in support of the Petition for Writ of Certiorari heretofore submitted.

WHEREFORE, the movants respectfully move this Court for an Order allowing them to file a brief amici curiae on the merits in support of the Petitioners.

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BRIEF OF AMICI CURIAE

I. INTEREST OF AMICI CURIAE

The ALL INDIAN PUEBLO COUNCIL, INC., is an organization composed of all nineteen (19) Indian Pueblos in the State of New Mexico, a non-profit corporation under the laws of the State of New Mexico, the purpose of which is to act in concert for the advancement of goals common to the Indian Pueblos of New Mexico. The movant Indian Tribes, the PUEBLOS OF ISLETA, JEMEZ, NAMBE, SANDIA, SAN JUAN, and ZIA, are Indian Tribes duly recognized by the United States, exercising powers of self-government. All tribes, except for the PUEBLO OF JEMEZ, are organized under the Act of June 18, 1934, 25 USC 461, *et seq.*; this Pueblo is, however, recognized as a tribal government by the United

States of America and has plenary power over its tribal members and all tribal affairs. All of the Pueblos in New Mexico have very active Pueblo governments. New Mexico is not a P.L. 280 State, which means that all jurisdiction, criminal and civil, with respect to its own affairs and those of Indian people, resides in the tribal government and not in any State jurisdiction. All of the Pueblos are extremely active in not only their own internal tribal affairs, but also dealing with other entities, including the Federal Government, State Government, County Government, local government, lessees, joint ventures, all manner of contracting parties, other tribes, and, in general, they deal much as would a municipal government with people and entities. The long-standing principle of Sovereign Immunity was reaffirmed in *Santa Clara v. Martinez,* 436 U.S. 49 (1978), by this Court in 1978.

If the present case stands and is not addressed by this Court, it will have a serious, adverse, and immediate impact upon the tribal sovereignty, tradition, culture, and religion of all of the movants. The basic question in this case is whether tribes enjoy sovereign immunity as a government or not. This question is of overwhelming importance to the movants and fundamental to the continuance of tribal government.

ARGUMENT

POINT ONE

THE DECISION OF THE TENTH CIRCUIT IS DIRECTLY CONTRARY TO THE DOCTRINE OF SOVEREIGN IMMUNITY ANNOUNCED BY THIS COURT.

In the *Martinez* case, *supra* this Court reaffirmed the Doctrine of Sovereign Immunity as it applied to Indian tribes. This was not a declaration of new law but was an affirmation of existing law, as manifested by this Court in

United States v. U.S. Fidelity and Guaranty Co., 309 U.S. 506 (1940). The *Martinez* case was a difficult tribal membership case arising out of an allegation by a female member of the Santa Clara Pueblo of sex discrimination. This Supreme Court ruled in essence that, except with respect to habeas corpus as expressed in 25 USC 1301, the Indian Civil Rights Act, Congress did not intend to waive the sovereign immunity which protected tribal governments. In the present case below, the Court of Appeals, notwithstanding the unusual reasoning contained in its opinion, did in fact hold that sovereign immunity was not truly sovereign immunity if a tribe acted in a way which the Court perceived as being unfair to non-Indian lessees.

If the law is to change, and sovereign immunity is to be denied to tribes, only Congress can so state. *Wilson v. Turtle Mountain Band of Chippewa Indians, et al.*, 459 F.Supp. 366, 369 (D.N.D., 1978). If the rules are to be changed by denying this protection, then Congress must also undertake a wide spectrum of questions regarding the special status of Indian tribes. For example, if Tribes are to be exposed to all manner of suits by disgruntled persons and entities, Congress should provide some machinery to adjudicate these claims (as opposed to the peculiar characterization of this case in District Court, an admixture of Constitutional rights and personal financial loss), forums to deal with it, legal staffs at Federal expense to protect the tribes, and perhaps rules of conduct adopted by the Secretary of Interior on ways in which tribes must treat non-Indians. None of these has been done by Congress. Until Congress does so, it is respectfully urged that no Court should seek to isolate a small piece of a large problem and rewrite the law regarding that piece.

POINT TWO

THE DECISION IN *SANTA CLARA V. MARTINEZ* WAS EMINENTLY CORRECT AND SHOULD BE REAFFIRMED BY THIS COURT.

The Tenth Circuit has chosen to either overrule or rise above the ruling in *Santa Clara v. Martinez, supra.* Apparently the Supreme Court must state yet again the meaning of sovereign immunity and the way in which sovereign immunity applies to Indian tribes.

A review of cases, beginning in 1968 when the Indian Civil Rights Act was passed by Congress, until 1978 when the clarifying opinion in *Santa Clara v. Martinez* was issued, shows the lower courts of the land were in considerable disarray concerning the interpretation of the Indian Civil Rights Act. Some Courts held that sovereign immunity only was waived with respect to a tribe in a case of habeas corpus; others allowed any claimant to sue a tribe for virtually any reason. For example, at the time of the rendering of the *Martinez* decision, pending in the Federal District Court of New Mexico were cases involving disgruntled Head Start teachers who, their jobs having been abolished because of changing Federal guidelines, sued the Pueblo of Isleta (*Dolores C. Lucero, et al., v. The Isleta Pueblo Tribe of Indians, et al.,* No. CIV-77-790M [D.N.M., 1978]), and an irritated sand and gravel permittee, ignoring Interior procedures for such things, who filed a case in Federal District Court concerning a business disagreement with the Pueblo of San Ildefonso (*Richard Cook v. Pueblo of San Ildefonso,* No. CIV-77-100M [D.N.M., 1978]). These cases were properly dismissed following the *Martinez* decision. If the present case is allowed to stand unchallenged, the flood gates will swing open again, and the tribal governments will be plagued by lawsuit after lawsuit, seemingly characterized by (1) being frivolous, and (2) being pursued straight

away in Federal Court instead of proceeding through the tribal government system or through Interior procedures.

CONCLUSION

The questions presented by the instant case are of overwhelming importance to the Pueblos and tribal organizations, amici curiae, and it is imperative that the Tenth Circuit decision be reviewed by the Supreme Court.

Respectfully submitted,

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No. 80-613

In the Supreme Court of the United States

OCTOBER TERM, 1980

SHOSHONE AND ARAPAHOE TRIBES, PETITIONERS

v.

DRY CREEK LODGE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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QUESTION PRESENTED

Whether an Indian Tribe is immune from suit brought by a non-Indian to recover damages for an alleged violation of the Indian Civil Rights Act.

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INTEREST OF THE UNITED STATES

The interest of the United States arises out of its special relationship to American Indians. *United States* v. *Kagama*, 118 U.S. 375, 382 (1886); *United States* v. *Klamath Indians*, 304 U.S. 119, 123 (1938).

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–8a) is reported at 623 F.2d 682. An earlier opinion of the court of appeals in this case (Pet. App. 21a–39a) is reported at 515 F.2d 926. The various orders and findings of the district court (Pet. Apps. B, C, E, F, G) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a–8a) was entered on June 20, 1980. A petition for rehearing en banc was denied on July 18, 1980 (Pet. App. 53a–56a). The petition for a writ of certiorari was filed on October 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The petitioners are the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation in Wyoming. The Tribes were sued in the United States District Court for the District of Wyoming by respondents, who are two non-Indian owners of Dry Creek Lodge, Inc. (the Cooks), that corporation, several Indian employees of the corporation, and a non-

Indian former owner of the land where the lodge is located.[1]

Respondents Albert and Elizabeth Cook owned 160 acres of land within the Wind River Indian Reservation. Access to the land was by a private dirt road that crossed trust allotments of the Bonatsie family, members of the Shoshone Tribe. Until 1974, the Cooks used their land solely for stock-raising and residential purposes. The Bonatsies permitted them to use the road, although the Cooks had not obtained a right-of-way pursuant to procedures set out at 25 C.F.R. Part 161 (Pet. App. 10a, 23a).

Early in 1974 the Cooks began to construct a lodge, containing a bar and restaurant, on the land. The Bonatsies objected to use of the access road for patrons of the lodge. They complained to the Joint Business Council of the Tribes. The Joint Business Council, by resolution, requested the Superintendent of the Reservation to prevent further use of the road. A barricade was thereupon erected by members of the Bonatsie family (Pet. App. 11a.)

The respondents brought suit for a declaration that they owned a right-of-way across the Bonatsies' land; to enjoin federal officials and tribal members from interfering with their alleged right-of-way; and to obtain

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[1] While the complaint also named as defendants the United States, the Secretary of the Interior, the Area Director of the Bureau of Indian Affairs, the Wind River Agency Superintendent, a BIA law enforcement officer, the Joint Business Council of the Tribes and the individual members thereof, and individual Indian allottees, claims against all defendants except the Tribes have been resolved against the plaintiffs at various stages of the case.

money damages for alleged conspiracies to deprive them of civil rights and for violations of due process and equal protection. The district court issued a temporary restraining order allowing use of the road for noncommercial purposes, and the barricade was removed. After a hearing on the motion for preliminary injunction, the court issued findings of fact and conclusions of law (Pet. App. 9a–18a), and dismissed the case for lack of jurisdiction (Pet. App. 19a–20a). The court found that the plaintiffs failed to show that they owned a right-of-way; that the United States and the Tribes were immune from suit; and that the complaint did not allege facts sufficient to establish that any of the individual defendants had acted outside the scope of his authority or conspired to violate respondents' civil rights (Pet. App. 13a–18a).

On appeal, the United States Court of Appeals for the Tenth Circuit reversed the district court's dismissal of the case against the Tribes, the Joint Business Council, and the federal officials (Pet. App. 21a–39a). Although the court of appeals agreed with the district court that the United States is immune from suit (Pet. App. 25a), the court of appeals ruled that the Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq.* (ICRA), waived the Tribes' sovereign immunity and created a federal cause of action (Pet. App. 31a–35a).

On remand, after presentation of the plaintiffs' evidence, the district court directed verdicts in favor of all defendants except the Tribes and two federal officials. The jury then considered claims against the Tribes for denial of equal protection and deprivation of

liberty without due process in violation of the ICRA, 25 U.S.C. 1302(8), and against the federal officials for deprivation of liberty without due process. The jury found in favor of the federal officials but awarded judgments totalling $525,000 against the Tribes (Pet. App. 41a–42a).

Upon motion of the Tribes, the district court set aside the jury verdict and granted a new trial with respect to liability and damages (Pet. App. 45a), on the ground that the jury had disregarded the court's instructions. Soon thereafter, this Court decided *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58–59 (1978), holding that the ICRA does not waive a Tribe's sovereign immunity. The district court then granted the Tribes' motion to dismiss, on the ground that *Santa Clara* "squarely applies to this action" (Pet. App. 46a).

A divided court of appeals reversed and remanded for a new trial on the issue of damages (Pet. App. 1a–7a). The court of appeals majority concluded that *Santa Clara* was distinguishable because that case involved an internal dispute between tribal members and the tribal government (Pet. App. 5a). The majority also expressed its view that respondents would have no other remedy and concluded that "[t]here has to be a forum where the dispute can be settled" (Pet. App. 6a). Judge Holloway dissented, concluding that the "broad terms" of the *Santa Clara* opinion did not support the majority's limitation of the sovereign immunity holding in *Santa Clara* to intra-tribal disputes (Pet. Ap. 7a–8a).

The Tribes' petition for rehearing with suggestion for rehearing en banc was denied on July 18, 1980 (Pet. App. 53a).

DISCUSSION

The court of appeals was incorrect in holding that the Tribes' immunity from suit does not extend to suits by non-Indians for money damages for violation of the ICRA. The decision is so clearly erroneous under decisions of this Court respecting tribal immunity that summary reversal is warranted.

1. The court of appeals' ruling that the Tribes are subject to damage suits under the ICRA cannot be reconciled with this Court's decision in *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 58–59. There, the Court stated that "tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers," and that "a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' " *Id.* at 58, quoting *United States* v. *Testan*, 424 U.S. 392, 399 (1976); see also *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980). Finding no "unequivocal expression of contrary legislative intent," the Court held that "suits against the tribe under the ICRA are barred by its sovereign immunity from suit." 436 U.S. at 59. The Court further held that, even in the absence of sovereign immunity, there is no implied federal right of action under the ICRA. 436 U.S. at 59–72.

Nothwithstanding this Court's explicit holdings in *Santa Clara*, the court of appeals in the instant case found an implied waiver of the Tribes' sovereign im-

munity in the ICRA and a private right of action in federal court against the Tribes under that Act. The court of appeals distinguished *Santa Clara* on the ground that it involved an "intratribal" dispute, concerning membership in the Tribe (Pet. App. 5a–6a). But there is nothing in *Santa Clara* that limits a tribe's sovereign immunity to suits arising from intra-tribal disputes.[2] To the contrary, this Court supported its sovereign immunity holdings in *Santa Clara* by citing (436 U.S. at 58) earlier decisions which did *not* involve intra-tribal disputes. One such case was *Puyallup Tribe* v. *Washington Dep't of Game*, 433 U.S. 165, 172–173 (1977), where the State of Washington was precluded by the doctrine of sovereign immunity from obtaining any relief against the Puyallup Tribe. Similarly, in *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512–513 (1940), the Court refused, on sovereign immunity grounds, to permit a non-Indian surety company to assert cross-claims for damages against the Choctaw and

[2]The discussion in *Santa Clara* regarding the availability of tribal courts to resolve the membership dispute there at issue (436 U.S. at 59–72), upon which the court of appeals relied (Pet. App. 6a–7a), was in connection with whether there was a private right of action under the ICRA against a tribal official who was *not* protected by the Tribe's immunity from suit (436 U.S. at 59). The portion of the *Santa Clara* opinion affirming the tribe's sovereign immunity from suit (*id.* at 58–59) makes no mention of remedies in tribal court. Even where a suit against individual tribal officers is not barred by the tribe's sovereign immunity, there is no basis for the court of appeals' implicit holding that there is a private right of action for damages under the ICRA when the plaintiff is a non-Indian. This Court's decision in *Santa Clara* did not turn on the identity of the plaintiff. The Court need not reach that question here, however, because the suit against the Tribes is barred by sovereign immunity.

Chickasaw Nations. Indeed, one of the plaintiffs in *Santa Clara* itself, Audrey Martinez, had been denied admission to the Tribe, and the Court recognized that the Martinez children "may not vote in tribal elections or hold secular office in the tribe; moreover, they have no right to remain on the reservation in the event of their mother's death * * * " (436 U.S. at 52–53). For practical purposes, then, the Martinez children stood on the same footing vis-a-vis the tribe as non-Indian residents of the reservation. See *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, No. 78–630 (June 10, 1980), slip op. 24.[3]

The decision below rests in large part on the belief that "[t]here has to be a forum where the dispute can be settled" (Pet. App. 6a). However, the purpose of sovereign immunity is to protect the sovereign against suits in *any* court, unless immunity has been waived. In the instant case, neither Congress nor the Tribes have waived that immunity. In any event, respondents were not entirely without redress. They were permitted to pursue their suit against the federal officials and the individual Indians, but simply lost on the merits.[4]

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[3]The court's attempt to limit tribal immunity to intra-tribal disputes is particularly inexplicable in view of the Tenth Circuit's earlier en banc decision in *Merrion* v. *Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir.), cert. granted, No. 80–11 (Oct. 6, 1980). In the context of a suit by non-Indians under the ICRA, the court there stated (617 F.2d at 540) that a tribe could not be sued absent consent. Although the court found such consent, it clearly recognized that *Santa Clara* and *United States Fidelity & Guaranty Co.* applied with full force to suits by non-Indians.

[4]It appears that respondents also could have sued the individual Shoshone defendants in the Court of Indian Offenses for

2. Sovereign immunity is of vital importance to Indian tribes. As this Court noted in *Santa Clara*, Congress, in enacting the ICRA, did not want to "impose serious financial burdens on already 'financially disadvantaged' tribes" by subjecting them to suit in federal court (436 U.S. at 64). That rationale would appear to apply even more strongly here, where substantial damages were sought and awarded,[5] than in *Santa Clara*, which considered only declaratory and injunctive relief. It would serve no rational policy to make immunity depend upon the identity of the plaintiffs, because the detriment to the tribe is the same whether a judgment is awarded to an Indian or a non-Indian. The decision below, which can be read to eliminate the

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the Wind River Reservation, which court has "jurisdiction of all suits wherein the defendant is a member of the tribe * * *." 25 C.F.R. 11.22. This Court noted in *Santa Clara* that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." 436 U.S. at 65. Although respondents alleged that the tribal judge indicated an unwillingness to hear their case, they did not test his unwillingness by actually filing a complaint. Dismissal of the case would have been appealable under 25 C.F.R. 11.6.

[5]The substantial award of damages against the Tribes here apparently was based on no more involvement by the Tribes in the temporary closing of the road than the passage of a resolution by the Joint Tribal Business Council requesting assistance from the reservation superintendent (Pet. App. 11a). As noted above (see page 4, *supra*) a new trial was ordered by the district court on the issue of liability and damages. Nonetheless, the jury's award of some $525,000 vividly underscores the threat to tribes that would be posed by finding an implied waiver of sovereign immunity from suits brought by non-Indians—plaintiffs who may often be particularly hostile to tribal programs.

defense of sovereign immunity whenever the plaintiff is a non-Indian, could seriously disadvantage the many tribes within the Tenth Circuit and encourage litigation against tribes in other circuits. This result would be inconsistent with Congress' judgment not to impose financial burdens on tribes by subjecting them to suit in federal court.

3. While the case is important, the issue presented has been thoroughly considered and settled in *Santa Clara* and earlier cases. The holding that tribal immunity does not apply to suits by non-Indians is flatly inconsistent with cases such as *United States* v. *United States Fidelity & Guaranty Co.*, *supra*; *Puyallup Tribe* v. *Washington Dep't of Game*, *supra*, and conflicts with the established principle that sovereign immunity cannot be waived by implication, *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 59. We therefore suggest that the case is appropriate for summary reversal.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the court of appeals should be reversed.

Respectfully submitted.

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